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Supreme Court, U.S.
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No. ——— OFFICE OF THE CLERK

In The

Supreme Court of the United States

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MIAMI NATION OF INDIANS
OF INDIANA, INC., et al.,

Petitioners,

v.

GALE NORTON, SECRETARY OF THE INTERIOR, et al.,

Respondents.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

◆

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Department of the Interior [Department] has authority to review the status of an Indian tribe formally recognized and never terminated by Congress, in the absence of abandonment of tribal relations.

2. Whether any deference is due to the Department's interpretation of its acknowledgment regulations, 25 C.F.R. Part 83 (1982 ed.), as incorporating the tribal abandonment standard for tribes formally recognized and never terminated by Congress.

PARTIES TO THE PROCEEDING

Petitioners are the Miami Nation of Indians of Indiana, Inc., also known as the Miami Nation of Indiana and the Miami Indians of Indiana, and Paul Strack, in his capacity as Chief of the Miami Nation of Indians of the State of Indiana, Inc.

Respondents are the United States Department of the Interior, Bureau of Indian Affairs, Branch of Acknowledgment and Research, United States of America, and Gale A. Norton, in her capacity as Secretary of the Department of the Interior.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, reference is made to the corporate disclosure statement by Petitioners in their principal brief in the Seventh Circuit Court of Appeals and dated January 12, 2001. That statement remains current.

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OPINIONS BELOW

The Department's final agency action in this matter appears at 57 Fed. Reg. 27312 (June 18, 1992). The District Court entered final judgment in an opinion published at 112 F. Supp.2d 742 (N.D. Ind. 2000) and granted partial summary judgment in decisions published at 832 F. Supp. 253 (N.D. Ind. 1993) and 887 F. Supp. 1158 (N.D. Ind. 1995). The Seventh Circuit Court of Appeals' judgment and decision are published at 255 F.3d 342 (7th Cir. 2001).

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JURISDICTIONAL STATEMENT

On September 6, 2001, the Seventh Circuit Court of Appeals entered its order denying the petition for rehearing in this matter. This petition for certiorari is timely filed under Supreme Court Rule 13(1) & (3) and this Court has jurisdiction under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL, TREATY, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. Art. I, sec. 8, cl. 3, United States Constitution:

> The Congress shall have power . . .
>
> To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

2. The Treaty of June 5, 1854, with the Miami, 10 Stat. 1093, is set out in full as Appendix C attached hereto.

3. 25 U.S.C. § 2:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and all matters arising out of Indian relations.

4. 25 U.S.C. § 9:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

5. 25 C.F.R. Part 83 (1982 ed.) is set out in full as Appendix D attached hereto.

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STATEMENT OF THE CASE

A. Background

The aboriginal Miami Indians signed a treaty with the United States in 1854, 10 Stat. 1093, which, among other things, recognized those Miami who remained in Indiana [Tribe] as a separate entity from those Miami who were removed to Oklahoma. *Wau-Pe-Man-Qua, alias Mary Strack v. Aldrich,* 28 F. 489 (D. Ind. 1886). Tribal members in Indiana occupied patented or reserved land obtained under earlier federal treaties and remained in the State of

Indiana with the State's permission. I.A.1.44-.55.[1] The approximately 4,700 modern day members of the Tribe are lineal descendants of those Indiana Miami separately recognized in 1854. Proposed Finding Against Federal Acknowledgment of Miami Nation of Indians of State of Indiana, Inc. [Proposed Finding], 55 Fed. Reg. 29423. The contemporary political organization of the Tribe traces to historical times as well. I.A.1.22. The Tribe has been consistently identified from historical times to modern times as an American Indian entity by Federal, State, and local officials. Proposed Finding, 55 Fed. Reg. 29423.

The Department of the Interior acknowledged the Tribe's status as federally recognized from 1854 until 1897.[2] In the latter year, the Department of Justice issued an opinion, rendered in response to the Tribe's request for assistance in setting aside local taxation of treaty allotted lands, that the Tribe could not be considered subject to the federal trust responsibility in light of the allotment of tribal lands and the grant of citizenship to tribal members. 25 Land Decisions 426 (GPO 1898) [Van Devanter Opinion]. Based on this opinion, the Department of the Interior immediately withdrew its acknowledgment of the Tribe as federally recognized, effectively terminating the Tribe. SR-IX.E.3 002; I.A.1.71. Later, the Department admitted that the Van Devanter decision was erroneous and that the Tribe was "inappropriately terminated administratively in 1897 . . . " S.R.IX.E.3 002.[3] Since 1897, the Department has refused to acknowledge the Tribe, even though the Department admits that the Congress has not terminated the Tribe. Proposed Finding, 55 Fed. Reg. at 29425.

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[1] All fact citations herein are to the administrative record developed by the Department in its deliberations on the Tribe's status under its acknowledgment regulations, 25 C.F.R. Part 83 (1982 ed.). This is the same administrative record reviewed by the courts below.

[2] Theoretically, the universe of Indian tribes recognized by Congress should be the same as that acknowledged by the Department of the Interior, inasmuch as the Department cannot undo an act of Congress. However, the Department has consistently used the term acknowledgment rather than recognition, suggesting, as the Court of Appeals held, that some formally recognized tribes may not be acknowledged as such by the Department. *See* 25 C.F.R. § 83.3 (1982 ed.); 25 C.F.R. § 83.3 (2000 ed.); Appendix A at 11. For consistency's sake, the terms are used in the same manner here: recognition to refer to a formal act of Congress establishing a government to government relationship with an Indian tribe, and acknowledgment to refer to the agency's acceptance of such status. However, use of these terms should not be taken as an admission that such a distinction is legally permissible. Indeed, a primary basis for the Tribe's petition for a writ of certiorari is

In 1978, the Department promulgated regulations governing the acknowledgment of Indian tribes. 25 C.F.R. Part 83 (1982 ed.). As authority for these regulations, the Department relies upon its general delegation of authority over Indian affairs from Congress, 25 U.S.C. §§ 2 & 9. *Id.* The acknowledgment regulations require a detailed examination of a petitioning Indian group's community, political leadership, and descent from an historical tribe

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its contention that such a distinction conflicts with this Court's decisions and expressions of Congress.

[3] The Department of the Interior administers relations between the United States and federally recognized tribes. 25 U.S.C. §§ 2, 9. Thus, the Department's refusal to acknowledge a tribe as federally recognized deprives that tribe of all the programs and services provided to federally recognized tribes, thereby effectively terminating that tribe. *See* 25 U.S.C. § 479a-1.

from the time of first sustained white contact until modern times. *Id.*, § 83.7. The regulations make no reference to or accommodation for tribes explicitly recognized by Congress but not acknowledged by the Department. There is no act of Congress authorizing these specific regulations or authorizing the Department to re-examine the status of federally recognized tribes.

B. Proceedings Below

The Tribe submitted a petition under the acknowledgment regulations in 1984, seeking to re-establish its federal acknowledgment. The Tribe maintained that, because of its formal recognition by Congress, a different substantive standard must be applied from that imposed by the regulations on other non-federally recognized tribes. The Tribe proposed to the Department that it apply a standard first articulated by this Court in *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866) – that is, that recognized Indian tribes retain that status unless terminated by Congress or "voluntary abandonment of their tribal organization" by the tribe. *The Kansas Indians* at 757. The Department explicitly rejected this tribal abandonment standard and subjected the Tribe to the full rigors of the acknowledgment regulations. I.B.1.29-30.

In its 1992 Final Determination on the Tribe's petition under the acknowledgment regulations, the Department concluded that the Tribe met all the mandatory criteria of those regulations, except that the Tribe's evidence showed insufficient intensity and breadth of community interaction and too low level political authority since the 1940's. Final Determination, 57 Fed. Reg. 27312 (June 18, 1992). As a result, the Department declined to acknowledge the Tribe under its regulations, even though the staff had observed that the Tribe had been "inappropriately terminated administratively in 1897, but have continued to maintain some degree of tribal characteristics." SR-IX.E.3 002.

In 1994, the Department revised its acknowledgment regulations and, for the first time, distinguished between previously acknowledged tribes and other non-federally recognized tribes. Public comments at the time proposed that, as to previously recognized tribes, the regulations provide that the tribe be automatically acknowledged unless the Government could demonstrate that the group had abandoned tribal relations voluntarily. The Department once again explicitly rejected this tribal abandonment standard for previously recognized tribes. Instead, the Department shortened the time depth requirement for previously acknowledged tribes and adopted a "streamlined demonstration" of the same criteria applicable to other petitioning groups. 59 Fed. Reg. 9280, 9282 (February 25, 1994).

Also in 1994, Congress enacted the Federally Recognized Indian Tribe List Act which requires that the Department annually publish a list of all federally recognized tribes. In the findings preceding the act, Congress declared that a "tribe which has been recognized in one of these manners [act of Congress or administratively] may not be terminated except by an Act of Congress . . . " Pub. L. 103-545, § 103(4), 108 Stat. 4791 (1994) (codified at 25 U.S.C. § 479a.) The committee report on the bill explained the purpose of this act as follows:

> While the Department clearly has a role in extending recognition to previously unrecognized tribes [citation to acknowledgment regulations omitted], it does not have the authority to "derecognize" a tribe. **However, the Department has shown a disturbing tendency in this direction. Twice this Congress, the Bureau of Indian Affairs (BIA) has capriciously and improperly withdrawn federal recognition from a native group or leader. . . . This growing and disturbing trend prompted the introduction of H.R. 4180. . . .**
>
> **The Committee cannot stress enough its conclusion that the Department may not terminate the federally-recognized status of an Indian tribe absent an Act of Congress. Congress has never delegated that authority to the Department or acquiesced in such a termination.**
>
> (emphasis added.)

H.Rep. No. 103-781, reprinted in 1994 U.S. Code Cong. and Admin. News 3768, at 3769, 3770.

In this litigation, the Department for the first time interpreted its 1978 acknowledgment regulations as incorporating the tribal abandonment standard for previously recognized tribes, even though the regulations make no reference to either previous recognition or tribal abandonment. The Department did so despite its explicit refusal to apply that standard to the Tribe and to adopt that standard in the 1994 revisions to the regulations. Whether the courts need defer to this new interpretation of the acknowledgment regulations by the Department (and, hence, whether the appropriate standard was applied to the already recognized Tribe) was vigorously disputed by the parties at all stages of this litigation. In the end, both the District Court and the Court of Appeals deferred to the Department's interpretation of the regulations in this regard. 255 F.3d 342, 350 (7th Cir. 2001) [Appendix A]; 887 F. Supp. 1158, 1170 (N.D. Ind. 1995) [Appendix B].

The Northern District of Indiana, South Bend Division, had jurisdiction over this matter under 28 U.S.C. §§ 1331, 1361, 2201 and 2202. The Seventh Circuit Court of Appeals had jurisdiction over the appeal under 28 U.S.C. § 1291.

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REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT AND CONGRESS' PLAINLY EXPRESSED VIEW THAT ONLY CONGRESS CAN TERMINATE A FEDERALLY RECOGNIZED INDIAN TRIBE.

At the heart of this controversy is the extent of the Department's authority, if any, to re-examine the tribal status of a tribe formally recognized by Congress and never terminated. The Department insists that recognition by Congress is not the determinative hallmark of an on-going relationship between the United States and an Indian tribe; rather, according to the Department, the determinative hallmark is the maintenance of continuous tribal relations by the tribe. The Department determines the latter by application of its acknowledgment regulations, which the Department now interprets as having incorporated the tribal abandonment standard for previously acknowledged tribes.

The Court of Appeals accepted the Department's ad hoc interpretation of its regulations. In its most telling passage, the Court of Appeals reasoned that the 1978 acknowledgment regulations authorize the Department to look behind federal recognition of a tribe: "[the regulation] implies that a tribe can indeed cease to be recognized by failing to satisfy the regulation's criteria." Appendix A at 11. In short, by simply subjecting a recognized tribe to its acknowledgment regulations and finding the tribe's evidence lacking in some regard, the Department asserts the authority to terminate a federally recognized tribe for all practical purposes. This is precisely what happened to the Tribe.[4]

The Congress was understandably disturbed by this claimed authority by the Department and sought to check it in 1994. Congress mandated that the Department maintain a list of federally recognized tribes for the purpose of insulating such tribes against re-examination of their status by the Department. *See* 25 U.S.C. § 479a; H.Rep. No. 103-781, reprinted in 1994 U.S. Code Cong. and Admin. News 3768. In doing so, Congress asserted its constitutional prerogative to manage Indian affairs and explicitly observed that the Department cannot terminate a federally recognized tribe; Congress has not delegated that authority so only Congress can do so. Pub. L. 103-545, § 103.

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[4] The Tribe has suffered this fate twice in its history at the hands of the Department of the Interior. First, the Department purported to terminate the Tribe administratively in 1897 when it withdrew acknowledgment based upon the 1897 Van Devanter opinion. The Tribe challenged this admittedly "inappropriate" action by the agency [*see* SR.I.X.E.3 002] in proceedings below, but the District Court ruled that this claim was barred by statute of limitations. 832 F. Supp. 253. The Court of Appeals did not reach this issue and, for that reason, the Tribe does not present it for review here. Second, the Department once again purported to back-handedly terminate the Tribe's status in 1992 by application of its acknowledgment regulations as described above. The Tribe's challenge to this agency decision is clearly timely, was addressed by the Court of Appeals, and is the basis for this petition for a writ of certiorari.

Congress' observation on this score is solidly based in long-standing authority of this Court. Summarizing a long line of Supreme Court cases beginning with *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831), this Court concluded in 1911:

> Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship which has been maintained over the Indians shall cease.

Tiger v. Western Investment Co., 221 U.S. 286, 315 (1911); *accord United States v. Nice,* 241 U.S. 591, 598 (1916); *The Kansas Indians,* 72 U.S. at 755-57; *United States v. Holliday,* 70 U.S. (3 Wall.) 407, 410 (1866). This is not to say that federal recognition continues without any regard to the tribe's continuing status as such. However, as this Court concluded in *The Kansas Indians,* it does so unless one of two events occurs: termination of the relationship by Congress or abandonment of tribal relations by the tribe. *Id.*

By establishing a baseline of federally recognized tribes in 1994, Congress presumably limited the Department's opportunity to re-examine the status of a federally recognized tribe. At a minimum, some process would be due in the event the Department were to omit a federally recognized tribe from its annual list as a prelude to reconsideration of the particular tribe's status. However, such limitation in the future depends solely upon the Department's forbearance, at least as the Court of Appeals interprets the regulations.[5] Were the Department to omit a previously listed tribe from its list of federally recognized tribes, the Department could under authority of the Court of Appeals' decision here subject that tribe to its acknowledgment regulations and could find, as it did with the Tribe, that its evidence is insufficient in some respect.

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[5] Arguably, another act of Congress enacted months before the Federally Recognized Tribes List Act of 1994 precludes the Department from merely dropping a recognized tribe from its list for the purpose of re-examining tribal status or any other purpose. The Congress has prohibited any agency from adopting any regulation or making any decision that treats one federally recognized tribe differently from other federally recognized tribes. Pub. L. 103-263, § 5(b), 108 Stat. 709, codified at 25 U.S.C. § 476(f). At the same time, Congress set aside any regulation or administrative decision in existence as of May 31, 1994, and that treated one federally recognized tribe differently from others. *Id.*, 25 U.S.C. § 476(g). The Tribe asserted a claim here under 25 U.S.C. § 476(g), but the District Court failed to distinguish federal recognition from federal acknowledgment and held that, because the Department does not acknowledge the Tribe, the Tribe is not federally recognized within the meaning of the statute. 112 F. Supp.2d 742, 761-62. Of course, under this construction of section 476(f) and (g), the Department can deprive a tribe of the intended statutory protection by simply dropping the tribe from its annual list. The Court of Appeals did not reach this issue, though, and it is not the subject of this petition for certiorari.

Of course, the Department has omitted from all lists of federally recognized tribes some tribes, like the Tribe here, that have been formally recognized by Congress but are no longer acknowledged by the Department. Under the Court of Appeals' holding, the Department can simply apply its acknowledgment regulations to such tribes with no inquiry under the tribal abandonment standard and decree the tribes no longer acknowledged. Such administrative action would for all practical purposes constitute the de-recognition decried by Congress.

It is unclear how many tribes are in such a position. There appears to be no other documented instance of termination by administrative fiat, as there was here in 1897. However, there are other tribes that, for whatever reason, simply fell by the wayside although recognized at one point in history by Congress. The 1994 revisions to the acknowledgement regulations clearly contemplate such instances but, because of the lengthy time involved in the processing of petitions, the issue is only now coming to the fore.[6] In fact, the Department first directly wrestled with this problem in its 2001 decision on the Chinook petition. There, for the first time, the Department applied the tribal abandonment standard to a previously recognized tribe and concluded that the tribe should be acknowledged. 66 Fed. Reg. 1690 (January 9, 2001). This decision was challenged by a third party and is currently before the Interior Board of Indian Appeals for review.

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[6] In a recent General Accounting Office [GAO], the GAO identified the length of time involved in processing petitions under the acknowledgment regulations as a substantial weakness in the administrative acknowledgment process. *Indian Issues: Improvements Needed in Tribal Recognition Process* (GPO 2001, GAO Rep. No. 02-49), at 14. Of the ten (10) petitioners currently ready for review of their documents, six (6) have been awaiting administrative review for five years or more. Once administrative review begins, the process takes a

Clearly, the Department's current interpretation of its acknowledgment regulations, which interpretation was adopted by the Court of Appeals, represents a serious incursion into Congress' prerogative of determining whether and when to terminate its relationship with Indian tribes. It also results in grave injustice to the Tribe and any other tribe that may be subjected to the Court of Appeals' interpretation of the Department's authority. The Court of Appeals' decision merits this Court's review to preserve the sanctity of the federal relationship with Indian tribes.

2. THE COURT OF APPEALS' DECISION SHOULD BE VACATED AND REMANDED FOR RECONSIDERATION IN LIGHT OF THIS COURT'S INTERVENING DECISION IN *UNITED STATES V. MEAD CORP.*

The level of deference due to the Department's interpretation of its regulations has been vigorously disputed throughout this litigation. Citing *Chevron, U.S.A., Inc. v.*

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minimum of two years to complete. *Id.* at 15-16. As a result, petitioners are only now coming to a point in the process to challenge the 1994 regulations as applied to previously acknowledged tribes.

Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the District Court held that, even though there was no evidence that the Secretary specifically considered the inclusion of the tribal abandonment standard in the 1978 regulations, the court owed deference to the Department's interpretation of the regulations as having incorporated that standard. Appendix B at 12. The Court of Appeals likewise adopted wholesale the Department's interpretation of its regulation, even though it acknowledged that the Department ignored the distinction between recognition and abandonment in its 1978 regulations. The Court of Appeals did so without citing any authority regarding the level of deference due under the circumstances. Appendix A at 11-12.

Three days after the Court of Appeals' decision here, the Supreme Court announced its decision in *United States v. Mead Corp.*, 121 S. Ct. 2164 (June 18, 2001). In *Mead Corp.*, this Court made clear that *Chevron* deference is not necessarily due to agency interpretation of regulations; rather, the level of deference owed depends upon a number of factors, including the persuasiveness of the agency's reasoning. *Id.* at 2173. In so holding, the Court returned to the more flexible approach to deference found in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), reserving full *Chevron* deference for those instances where Congress expressly delegated rule making authority to the agency and the agency made the decision following notice and comment. *Id.* at 2172, 2179, describing the "new rule" (J. Scalia, dissenting.)

The Seventh Circuit clearly understands the *Mead Corp.* decision as representing a clarification of the *Chevron* deference rule. *American Federation of Government*

Employees, et al. v. Rumsfeld, 262 F.3d 649, 656 (7th Cir. 2001); *see also United States Freightways Corp. v. Commissioner,* 2001 WL 1356392 (Nov. 6, 2001): "Both the informality of this interpretation and the context in which it has arisen persuade us that full Chevron deference is not appropriate here. Mead expressly disapproved of the exercise of such deference for the customs regulations that were at issue there, in part because of the bootstrapping that could otherwise occur." Indeed, this Court has already vacated and remanded one judgment to the Seventh Circuit for reconsideration in light of *Mead Corp. See Matz v. Household International Tax Reduction Investment Plan,* 265 F.3d 572 (7th Cir. 2001), *on remand.*

The deference extended by the lower courts to the Department's interpretation of its regulations as incorporating the tribal abandonment standard, an interpretation adopted for the first time in this litigation, was clearly a significant factor in the Court of Appeals' analysis. As this Court and the Congress have indicated, the Department lacks authority to terminate a federally recognized tribe. Only an act of Congress or abandonment of tribal relations can accomplish such. In its 1992 decision on the Tribe's petition and in its 1994 revisions to the acknowledgment regulations, the Department explicitly rejected the tribal abandonment standard as necessary or appropriate. As this litigation has proceeded, though, the Department has come to the view that it did, after all, apply the tribal abandonment standard, that standard being the same as the acknowledgment regulations. This is precisely the kind of agency interpretation to which very little deference is now due. These circumstances require that the judgment below be vacated and the matter remanded for reconsideration in light of *United States v. Mead Corp, supra.*[7]

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[7] In an alternative holding, the Court of Appeals indicated that the Department's failure to apply the tribal abandonment standard was "harmless error" in light of the Tribe's abandonment of tribal relations. Appendix A at 12. The basis for the court's conclusion in this regard is baffling, to say the least. In its petition for rehearing, the Tribe argued that the Government had misstated the record to suggest to the court that the Tribe had disappeared. The Tribe referred the Court of Appeals to numerous references in the administrative record that state, to the contrary, that the Tribe has maintained tribal characteristics, albeit at an insufficient level in the Department's view to meet the acknowledgment regulations. SR-IX.E.3 002. In its response to the Tribe's petition for rehearing, the Government denied having asserted that the Tribe has disappeared. Thus, there is no basis in the record for the Court of Appeals' conclusion that the Tribe had ceased to exist. These differing factual inferences highlight the importance of determining the appropriate level of deference due to the Department's newfound interpretation of its regulations.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted, or, in the alternative, the judgment vacated and remanded to the Seventh Circuit Court of Appeals for reconsideration in light of *United States v. Mead, supra.*

Respectfully submitted,

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Appendix

A. Opinion and Judgment of the Seventh Circuit Court of Appeals, entered June 15, 2001........A-1

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APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

No. 00-3465

MIAMI NATION OF INDIANS
OF INDIANA, INC., *et al.*,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT
OF THE INTERIOR, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 92 C 586 – **Robert L. Miller, Jr.**, *Judge.*

ARGUED MAY 8, 2001 – DECIDED JUNE 15, 2001

Before BAUER, POSNER, and COFFEY, *Circuit Judges.*

POSNER, *Circuit Judge.* Article I of the Constitution authorizes Congress to regulate commerce with Indians. As an original matter, the power to recognize an Indian tribe might be thought quintessentially and exclusively Presidential, *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993), like the power to recognize (or not recognize) a foreign nation, *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 410 (1964) ("political recognition is exclusively a function of the Executive"); *Clark v. Allen,* 331 U.S. 503, 514 (1947); *Mingtai Fire & Marine Ins. Co. v. United Parcel Service,* 177 F.3d 1142, 1145 (9th Cir. 1999), even though Article I also gives Congress the power to regulate foreign commerce. But Indian tribes are not foreign – they are what Chief Justice Marshall called "domestic dependent nations," *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 12 (1831) – and the general view nowadays, which none of the parties to this suit has questioned (though of course a concession on a jurisdictional issue does not bind us), is that Congress has the power, both directly and by delegation to the President, to establish the criteria for recognizing a tribe. See, e.g., *Cherokee Nation of Oklahoma v. Babbitt,* 117 F.3d 1489, 1503 (D.C. Cir. 1997); *Fletcher v. United States,* 116 F.3d 1315, 1333 (10th Cir. 1997); *Western Shoshone Business Council v. Babbitt, supra,* 1 F.3d at 1056-57. This makes practical sense. Congress has passed a number of statutes granting various benefits and immunities to Indian tribes, provided they are recognized by the federal government. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450b(b); Indian Financing Act of 1974, 25 U.S.C. § 1452(c); see *Greene v. Babbitt,* 64 F.3d 1266, 1269 (9th Cir. 1995). Naturally and legitimately, Congress is concerned which groups of Indians are given the status of tribes. But the analogy to recognition of foreign governments has prevailed to the extent that Congress has delegated to the executive branch the power of recognition of Indian tribes without setting forth any criteria to guide the exercise of that power. See 25 U.S.C. §§ 2, 9.

In 1978, the Department of the Interior promulgated a regulation that sets forth such criteria. A group of Indians that is seeking recognition as a tribe entitled to federal largesse (the regulation calls recognition "acknowledgment" and the terminology may be significant, as we'll see later) has to satisfy seven criteria: (a) the group has been identified from historical times to the present, on a substantially continuous basis, as Indian; (b) "a substantial portion of the . . . group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and . . . its members are descendants of an Indian tribe which historically inhabited a specific area"; (c) the group "has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present"; (d) the group has a governing document; (e) the group has lists of members demonstrating their descent from a tribe that existed historically; (f) most of the members are not members of any other Indian tribe; (g) the group's status as a tribe is not precluded by congressional legislation. 25 C.F.R. § 83.7. In 1980, the Miami Nation of Indians of Indiana petitioned Interior for recognition that it was an Indian tribe. (Obviously the fact that it calls itself a "nation" is not dispositive.) Twelve years later, Interior ruled that the Miami had not satisfied criteria (b) and (c) (the ones we quoted rather than paraphrased) of the regulation and therefore would not be recognized. 57 Fed.Reg. 27312 (1992). The Miami Nation sought judicial review in the district court and appeals to us from that court's decision upholding

Interior's ruling. 112 F. Supp. 2d 742 (N.D. Ind. 2000). Earlier decisions by the district court in this protracted litigation are cited in the 2000 opinion.

In 1854 the President of the United States had made a treaty (ratified by the Senate) with the "Miami Indians," 10 Stat. 1093, a tribe described in the treaty as consisting of both "Indiana Miamis" and "Western Miamis." Although the matter is not free from doubt, we shall assume that the Miami Nation, though limited to Indiana Miamis, is the tribe referred to in the 1854 treaty; and it is obvious from the treaty that the President recognized the tribe as being, indeed, an Indian tribe. It is equally obvious that Indian nations, like foreign nations, can disappear over time – can go the way of Sumeria, Phoenicia, Burgundy, the Ottoman Empire, Prussia, the Republic of Texas, and the Republic of Vietnam, whether through conquest, or voluntary absorption into a larger entity, or fission, or dissolution, or movement of population.

In the century and a half since President Pierce signed the treaty with the Miami Indians, and especially since 1940, the Miami has dwindled. Today there are only about 4,700 Indiana Miamis, scattered across the nation, with only one-third resident in a more or less contiguous group of five Indiana counties – in which, however, the Miamis, who live dispersed throughout the area rather than in their own separate communities within it, constitute less than one half of one percent of the counties' population. Only about 20 percent of this group socialize with one another. On average only 3.5 percent attend the annual reunion that is the sole organized event of the group. We were told at argument without contradiction that it has been decades since any member of the Miami Nation sought to avail himself or herself of any of the benefits or immunities that Congress has extended to members of recognized Indian tribes.

There is a tribal council, but it performs no meaningful governance functions. There is scant contact between the council and the rest of Indiana Miamis, and the instances in which the council has tackled important issues, such as cemetery relocation, are few and far between. Since 1940 the council has rarely dealt with the kind of governmental or political issues that agitate tribes, including hunting and fishing rights, disputes between tribal factions, and loss of tribal lands. The council has been more active since 1979, when it bestirred itself to seek federal recognition of the Miami Nation. It now operates a number of programs concerned with welfare (such as day-care programs) and economic development, and it has sought and obtained grants to fund these programs. But such programs, charitable rather than administrative in character, are a far cry from "governance."

The Indiana Miamis have thus failed to satisfy the two quoted criteria in the Department of the Interior's regulation. But they argue that the regulation is invalid because not authorized by Congress. This is clearly incorrect, see 25 U.S.C. §§ 2, 9; *James v. HHS*, 824 F.2d 1132, 1137 (D.C. Cir. 1987); *Western Shoshone Business Council v. Babbitt, supra*, 1 F.3d at 1056-57; nor is it clear that it *has* to be authorized by Congress. Recognition is, as we have pointed out, traditionally an executive function. When done by treaty it requires the Senate's consent, but it never *requires* legislation, whatever power Congress may have to legislate in the area. What is more, and placing in question whether we are even authorized to review the decision not to recognize the Miami Nation, recognition lies at the heart of the doctrine of "political questions." The doctrine identifies a class of questions that either are not amenable to judicial resolution because the relevant considerations are beyond the courts' capacity to gather and weigh, see, e.g., *Nixon v. United States*, 506 U.S. 224, 228-29 (1993); Laurence H. Tribe, *American Constitutional Law*, vol. 1, 365-85 (3d ed. 2000), or have been committed by the Constitution to the exclusive, unreviewable discretion of the executive and/or judicial – the so-called "political" – branches of the federal government. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Jones v. United States*, 137 U.S. 202, 212 (1890); *Tucker v. United States Dept. of Commerce*, 958 F.2d 1411, 1415 (7th Cir. 1992); *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1311-14 (11th Cir. 2001); *Mingtai Fire & Marine Insurance Co. v. United Parcel Service, supra*, 177 F.3d at 1144-45; *Gordon v. Texas*, 153 F.3d 190, 193 (5th Cir. 1998); cf. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 327-28 (1994); *Banco Nacional de Cuba v. Sabbatino, supra*, 376 U.S. at 410.

The second branch of the doctrine, which is based on the extreme sensitivity of the conduct of foreign affairs, judicial ignorance of those affairs, and the long tradition of regarding their conduct as an executive prerogative because it depends on speed, secrecy, freedom from the constraint of rules – and the unjudicial mindset that goes by the name *Realpolitik* – is not engaged by a dispute over whether to recognize an Indian tribe. But the first branch, which focuses on the nature of the questions that the court would have to answer – which asks whether the answers would be ones a federal court could give without ceasing to be a court, ones within the cognitive competence, as distinct from the authority, of federal judges – is engaged by such a dispute. Consider the case usually thought to have invented the political-questions doctrine, *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). Rather than adopt a new constitution after the break with England, Rhode Island continued to use its colonial charter as its constitution. This action (or rather inaction) was unpopular. Restive citizens convened a constitutional convention not authorized by the charter. The convention adopted a new constitution to which the charter government, however, refused to submit, precipitating rebellion and the establishment in 1841 of a rival state government. The Supreme Court refused to decide which of the two competing state governments was the legitimate one. It would have been very difficult to gather and assess, by the methods of litigation, the facts relevant to such a decision, and even more difficult to formulate a legal concept of revolutionary legitimacy to guide the decision.

So if the residents of what was once the Kingdom of the Two Sicilies asked a federal court to recognize it as an independent nation, the court would invoke *Luther v. Borden* and tell them to take up the matter with the State Department. Cf. *Clark v. Allen, supra*. The question whether the Miami Nation constitutes a "nation" with a "government" with which the United States might establish relations is similar. It comes as no surprise, therefore, that "the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review." William C. Canby, Jr., *American Indian Law in a Nutshell* 5 (3d ed.1998); see *United States v. Holliday,* 70 U.S. (3 Wall.) 407, 419 (1866); *Cherokee Nation of Oklahoma v. Babbitt, supra,* 117 F.3d at 1496; *Western Shoshone Business Council v. Babbitt, supra,* 1 F.3d at 1057; *Felix S. Cohen's Handbook of Federal Indian Law* 3-4 (Rennard Strickland ed. 1982).

But this conclusion assumes that the executive branch has not sought to canalize the discretion of its subordinate officials by means of regulations that require them to base recognition of Indian tribes on the kinds of determination, legal or factual, that courts routinely make. By promulgating such regulations the executive brings the tribal recognition process within the scope of the Administrative Procedure Act. Cf. *Morton v. Ruiz,* 415 U.S. 199, 235 (1974); *Hein v. Capitan Grande Band of Diegueno Mission Indians,* 201 F.3d 1256, 1261 (9th Cir. 2000). And the Act has been interpreted (1) to require agencies, on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations (whether formal, as here, or common-law-type doctrines) until the regulations are altered by proper procedures, *Webster v. Doe,* 486 U.S. 592, 602 n. 7 (1988); *Service v. Dulles,* 354 U.S. 363, 388 (1957); *Head Start Family Education Program, Inc. v. Cooperative Educational Service Agency 11,* 46 F.3d 629, 633 (7th Cir. 1995); *Cherokee Nation of Oklahoma v. Babbitt, supra,* 117 F.3d at 1499; *Florida Institute of Technology v. FCC,* 952 F.2d 549, 553 (D.C. Cir. 1992); Canby, *supra,* at 5, and (2) to make compliance with the regulations judicially reviewable, provided there is law to apply to determine compliance, 5 U.S.C. § 701(a)(2); *Webster v. Doe, supra,* 486 U.S. at 599-600; *Heckler v. Chaney,* 470 U.S. 821, 830 (1985); *Sprague v. King,* 23 F.3d 185, 188 (7th Cir. 1994) – as there is if despite the lack of *statutory* criteria, the agency's regulation establishes criteria that are "legal" in the sense not just of being obligatory but of being the kind of criteria that courts are capable of applying. *Ellison v. Connor*, 153 F.3d 247, 251-52 (5th Cir. 1998); *McAlpine v. United States*, 112 F.3d 1429, 1433-34 (10th Cir. 1997).

As we explained in *NLRB v. Kemmerer Village, Inc.*, 907 F.2d 661, 663-64 (7th Cir. 1990), with reference to the Labor Board – but the point is equally applicable to the Department of the Interior – "no one questions the validity of the doctrine [i.e., the NLRB's rule that an organization is exempt from the National Labor Relations Act if it is incapable of engaging in meaningful collective bargaining] in this proceeding. The only question is whether the Board misapplied the doctrine in the present case. This is a question for us because the Board is bound by its own rules until it changes them, *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087, 1093 (7th Cir. 1984), including the rules that it has adopted in order to channel what would otherwise be an essentially unreviewable discretion in the deployment of its limited prosecutorial resources, *State Bank of India v. NLRB*, 808 F.2d 526, 537 (7th Cir. 1986)." See also *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983); *Aramark Corp. v. NLRB*, 179 F.3d 872, 882 (10th Cir. 1999) (en banc). To put it more succinctly, the requirement of reasoned decisionmaking – the requirement that the APA places on agencies and that sets them apart from legislatures – implies that an agency may not deviate from its regulations without a reason, unlike a legislature, which can repeal a statute without giving a reason for its change of heart. See *Continental Web Press, Inc. v. NLRB*, *supra*, 742 F.2d at 1093-94. "A rational person acts consistently, and therefore changes course only if something has changed." *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1053 (7th Cir. 1992).

Two exceptions should be noted. First, as the "law to apply" provision of the APA makes clear, the fact that a regulation has been promulgated doesn't automatically make compliance with the regulation a justiciable issue. It depends on what the regulation says; it may not set forth sufficiently "law-like" criteria to provide guideposts for a reasoned judicial decision. Second, whatever it says, the regulation will not remove a case from the rule of that branch of the political-questions doctrine that is based not on the analytical or epistemic limitations of courts but on a lack of judicial authority, that is, the assignment of exclusive decisionmaking responsibility to the nonjudicial branches of the federal government. If in a matter within his exclusive authority the President wants to regularize the exercise of discretion by his subordinates, and to this end promulgates a regulation, the regulation does not empower the courts to jump in and determine compliance with it; the area is out of bounds for the courts. But this case, as we have seen, is not ruled by the second branch of the political-questions doctrine, and so far as the first branch is concerned *McAlpine* found that another Indian regulation of the Department of the Interior was a law-like and hence justiciable rule; and the existence of such a rule renders inapplicable the only branch of the political-questions doctrine that pertains to the recognition of Indian tribes. *Florida v. United States Department of the Interior*, 768 F.2d 1248 (11th Cir. 1985), reached a contrary conclusion from *McAlpine*, but only because it disagreed that the regulation in question was sufficiently directive to count as law. *Id.* at 1256-57. It did not disagree with the principle that *McAlpine* expounded and we accept.

The Department of Interior's regulation on recognition, the terms of which we quoted or paraphrased earlier, breaks the recognition issue down into a series of questions that are "legal" in the relevant sense, that is, are the sort of questions that courts are equipped to answer. The political-questions doctrine is therefore not in play and does not prevent the Miami Nation from arguing that the Department of the Interior committed error in the interpretation or application of the regulation, as by arbitrarily failing to recognize the Miami Nation as a tribe when the anthropologist that the Department itself had retained to conduct a study of the question recommended otherwise. There was no error in the Department's handling of the anthropologist's evidence, however. The Department had not, by its action in hiring an anthropologist to advise it, delegated to her the authority to determine whether the regulatory criteria for recognition had been met. It could not arbitrarily disregard the anthropologist's evidence, and it did not. It reviewed her report and found many errors and unsubstantiated conclusions. And it obtained additional information, after the anthropologist submitted her report, that further undermined the conclusions in it.

The Miami Nation makes the additional argument, however, that the Department used the wrong standard when it refused to recognize the Miami Nation as a tribe, namely the standard applicable to the recognition of a group of Indians that is seeking tribal status for the first time, a group never before recognized as a tribe though it must have *been* a tribe since "historical times" in order to be eligible for recognition under the regulation. The Miami Nation had been recognized back in 1854 – it was not seeking recognition – and so the applicable standard, it argues, is that applicable to the abandonment of tribal status. (Actually, recognition had been withdrawn by the Department of the Interior in 1897 – invalidly, the Miami Nation argues. We need not decide the issue; we can ignore the 1897 demarche.)

The Department ignored the distinction between recognition and abandonment. The regulation under which it proceeded does not mention "abandonment"; no regulation does, so far as we have been able to discover; and it might seem, therefore, that we are back in the arena of undomesticated discretion where either the political-questions doctrine or the APA's "law to apply" provision bars judicial review. But this is not so, and for two reasons. First, if the Department mistakenly proceeded under the recognition regulation and as a result did not exercise the discretion that it has to determine abandonment, the remedy is to remand for the exercise of that discretion. See, for example, *Chathas v. Local 134 IBEW*, 233 F.3d 508, 514 (7th Cir. 2000); *Channell v. Citicorp National Services, Inc.*, 89 F.3d 379, 387 (7th Cir. 1996); *Campanella v. Commerce Exchange Bank*, 137 F.3d 885, 892 (6th Cir. 1998). As we said in *Channell*, "Because he held that § 1367(a) did not authorize the exercise of supplemental jurisdiction, [the district judge] did not exercise the discretion § 1367(c) confers. It belongs to him rather than to us, so we remand for its exercise." 89 F.3d at 387.

Failure to exercise discretion, however uncanalized that discretion, is an abuse of discretion.

Second, the regulation *does* cover abandonment. Just the fact that it uses the term "acknowledgment" rather than "recognition" is suggestive. The original regulation, promulgated in 1978, allowed a group seeking acknowledgment to prove its satisfaction of the criterion of having been known as an Indian tribe since historical times by showing "repeated identification by Federal authorities." 25 C.F.R. § 83.7(a)(1). This covers a previously recognized tribe and by doing so implies that a tribe can indeed cease to be recognized by failing to satisfy the regulation's criteria. The regulation was amended in 1994 to require previously recognized tribes to show only that the criteria had been met since the last time the tribe was recognized by the federal government. See 59 Fed.Reg. 9280, 9282 (Feb. 25, 1994). This further weakens the inference that the only basis for withdrawal of recognition and hence for the denial of the benefits and immunities that Congress extends to recognized tribes is "voluntary abandonment" by the tribe.

And what sense would that make? Few nations dissolve or disband voluntarily (Czechoslovakia is perhaps the clearest recent example). It would be preposterous to suppose that because the Republic of Vietnam (i.e., South Vietnam) was conquered rather than voluntarily uniting with the People's Democratic Republic of Vietnam (North Vietnam), it must *still* be recognized by the United States. If a nation doesn't exist, it can't be recognized, whether or not it ceased to be a nation voluntarily. Our examples are of foreign nations, but in respect to the irrelevance of the cause of a nation's ceasing to be a nation the analogy of Indian tribes to them is compelling.

Probably by 1940 and certainly by 1992, the Miami Nation had ceased to be a tribe in any reasonable sense. It had no structure. It was a group of people united by nothing more than common descent, with no territory, no significant governance, and only the loosest of social ties. To what extent and in what sense this long-drawn-out process of dissolution of the tribe of 1854 should be called "voluntary" can be debated (there is no contention that it was coerced), but that it amounted to abandonment cannot be doubted. The federal benefits for the sake of which recognition is sought are extended to tribes, not to individuals, so if there is no tribe, for whatever reason, there is nothing to recognize. *Greene v. Babbitt*, 64 F.3d 1266, 1269 (9th Cir. 1995); *Felix S. Cohen's Handbook of Federal Indian Law, supra,* at 1. Recognition in such a case would merely confer windfalls on the members of a nonexistent entity.

We are mindful of cases such as *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 586-87 (1st Cir. 1979), which say that "if a group of Indians has a set of legal rights by virtue of its status as a tribe, then it ought not to lose those rights absent a voluntary decision made by the tribe and by its guardian, Congress, on its behalf." But such dicta presuppose that the tribe still exists. If it does, it cannot be divested of the rights that go with tribal status without its consent. But if it no longer exists, it has no rights to be divested of; there are no rights without a rights holder. That is the case of the Indiana Miamis.

So clear is this that if – as we do not for a moment believe – there was any error by the Department of the Interior in failing to consider principles of tribal abandonment explicitly instead of proceeding under the recognition regulation, it was a harmless one. And the doctrine of harmless error is applicable to administrative as to judicial decisions. 5 U.S.C. § 706(2)(F); *MBH Commodity Advisors, Inc. v. CFTC,* No. 00-1957, 2001 WL 476908, at *10 (7th Cir. May 7, 2001); *Sahara Coal Co. v. Office of Workers' Compensation Programs,* 946 F.2d 554, 558 (7th Cir. 1991); *Sierra Club v. United States Fish & Wildlife Service,* 245 F.3d 434, 444 (5th Cir. 2001).

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: June 15, 2001

BEFORE: Honorable WILLIAM J. BAUER, Circuit Judge
Honorable RICHARD A. POSNER, Circuit Judge
Honorable JOHN L. COFFEY, Circuit Judge

No. 00-3465

MIAMI NATION OF INDIANS OF INDIANA, INCORPORATED, also known as MIAMI NATION OF INDIANA and MIAMI INDIANS OF INDIANA, and PAUL STRACK, in his capacity as Chief of the Miami Nation of Indians of the State of Indiana, Inc.,
Plaintiffs - Appellants

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, Bureau of Indian Affairs, Branch of Acknowledgment and Research, UNITED STATES OF AMERICA, and GALE A. NORTON, in her capacity as Secretary of the Department of the Interior,
Defendants - Appellees

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division No. 92 C 586, Robert L. Miller, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

APPENDIX B

MIAMI NATION OF INDIANS
OF INDIANA, INC., et al.,
Plaintiffs,

v.

Bruce BABBITT, et al., Defendants.

No. 3:92-CV-586RM.

United States District Court,
N.D.Indiana,
South Bend Division.

April 24, 1995.

Arlinda F. Locklear, Jefferson, MD, Richard Dauphinais, Native American Rights Fund, Washington, DC, David L. Kiley, Sr., Albert C. Harker, Kiley Osborn Kiley Harker Rogers Michael and Certain, Marion, IN, for Miami Nation of Indians of Indiana, Inc.

Arlinda F. Locklear, Jefferson, MD, Richard Dauphinais, Native American Rights Fund, Washington, DC, Albert C. Harker, Kiley Osborn Kiley Harker Rogers Michael and Certain, Marion, IN, for Raymond White.

Kevin Meisner, Scott Keep, Dept. of Interior, Div. of Indian Affairs, R. Anthony Rogers, U.S. Dept. of Justice, Environmental & Natural Resources Div., General Litigation Section, Washington, DC, for Manuel Lujan, Jr., Dept. of Interior, Bureau of Indian Affairs, Branch of Acknowledgment and Research, U.S.

MEMORANDUM AND ORDER

MILLER, District Judge.

This cause is before the court on the parties' separate motions for partial summary judgment, the plaintiffs' motion for a hearing on the motions for summary judgment, the plaintiffs' motion for an order directing the government to complete the administrative record ("motion to compel discovery"), and the defendants' motion to strike or deny the plaintiffs' motion to compel discovery. A hearing on the summary judgment motions is unnecessary in light of the parties' excellent briefs, and would only delay the motions' resolution. Accordingly, the plaintiffs' motion for a hearing is denied.

The issues before the court today do not address the eventual decision by the Secretary of the Interior not to acknowledge the Miamis as a tribe, but instead focus on the validity of the regulations under which that decision was made. In today's issues, the Miamis contend that the Secretary of the Interior exceeded his authority in issuing the regulations in 1978, that the regulations are invalid because they omit explanations and definitions and because (the Miamis believe) the Secretary acted arbitrarily and capriciously in adopting the regulations. The Miamis also argue that the regulations do not satisfy constitutional requirements of due process and equal protection. For the reasons that follow, the court disagrees with each of these arguments.

Again, this ruling does not decide whether the Secretary acted properly in refusing to acknowledge the

Miamis as a tribe. In light of this decision that the regulations are valid, the court will turn to that issue in the weeks to come.

In addition to denying the plaintiffs' motion for summary judgment and granting the defendants' motion for summary judgment, the court also, for reasons set forth below, grants the defendants' motion to strike and orders the plaintiffs' motion to compel discovery stricken, without prejudice to refile exhibiting compliance with District Rule 37.1.

I.

The court presumes familiarity with the facts concerning this cause and with the court's prior orders, including *Miami Nation v. Lujan,* 832 F.Supp. 253 (N.D.Ind.1993), and therefore will repeat them only briefly here.

The Miami Indian tribe (the "Miamis") historically lived in the central and northern regions of Indiana. From 1795 to 1840, the Miamis entered into several treaties with the United States. As a result of one of those treaties, the Miamis split into two groups, with one group relocating to Kansas and the other remaining in Indiana. Generally, the United States interacted with the Indiana Miamis as covered under the United States' trust responsibilities. *See, e.g., Miami Nation v. Lujan,* 832 F.Supp. at 253-255 (discussing history of relations between the Miamis and the United States). In 1897, however, Assistant Attorney General Willis Van Devanter decided that the Indiana Miamis no longer were tribal Indians, and thus no longer were covered by the United States' trust responsibilities.

See id. at 255. The Secretary of the Interior (the "Secretary") approved the decision and withdrew acknowledgment of the Indiana Miamis; the Department of the Interior (the "Department") has refused to acknowledge the Indiana Miamis as an Indian tribe since then.

Until 1978, the Department made its decisions whether to acknowledge an Indian tribe on a case-by-case basis. *See* 25 Fed.Reg. 39,361 (1978). In 1978, the Department promulgated regulations providing a procedure for acknowledging the existence of Indian tribes. *See* 25 C.F.R. Part 83 (1978)[1] (the "1978 regulations"). On March 25, 1980, the Miamis filed a petition for federal acknowledgment as an Indian tribe pursuant to these regulations. On July 19, 1990, the Assistant Secretary of the Interior published his proposed finding that the Miamis do not meet the political influence and community criteria of the acknowledgment regulations. 55 Fed.Reg. 29,423 (1990). On June 18, 1992, the Assistant Secretary published his final determination that the Miamis do not exist as an Indiana [sic] tribe and, therefore, are not entitled to a government-to-government relationship with the United States. 57 Fed.Reg. 27,312 (1992).

The Miamis then filed a four-count complaint in this court. Count 1 sought a ruling that the Secretary of the Interior's decision withdrawing federal recognition of the Indiana Miamis in 1897 was *ultra vires;* the court ruled that the applicable statute of limitations barred that claim. *Miami Nation v. Lujan,* 832 F.Supp. at 257. Count 4 of the complaint, which is not presently before the court, seeks review of the Department's application of the acknowledgement regulations to the Miamis.

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[1] 25 C.F.R. Part 83 was revised in 1994. Both parties agree that this cause pertains solely to the regulations as they appeared from 1978 until the 1994 revision. Unless otherwise specified, all references to 25 C.F.R. Part 83 are to the 1978 version at issue in this cause.

Counts 2 and 3 of the complaint challenge the validity of the Department's 1978 regulations. In Count 2, the Miamis allege that the defendants exceeded their congressional authorization in issuing the regulations by allegedly imposing stricter requirements upon tribes seeking recognition after 1978 than those imposed before 1978. In Count 3, the Miamis allege that the regulations are invalid because they fail to define key terms or specify a burden of proof, because they provide no mechanism for independent review or administrative appeal, and because the regulations treat Indian tribes recognized before 1978 differently than those petitioning for tribal status after 1978.

The parties have filed cross-motions for partial summary judgment with respect to Counts 2 and 3. The Miamis seek a declaration that the 1978 regulations (1) exceed the Department of the Interior's statutory authority; (2) are not in accordance with the law, are without rational basis, and are arbitrary and capricious; and (3) violate the due process and equal protection provisions of the Constitution. The defendants seek a ruling that the 1978 regulations (1) are within the Congressional authority of the Secretary of the Interior to have promulgated; (2) have been promulgated in accordance with law and are not arbitrary, capricious, or without rational basis; and (3) do not violate any provision of the United States Constitution.

> A party seeking summary judgment must demonstrate that no genuine issue of fact exists for trial and that the movant is entitled to judgment as a matter of law. If that showing is made and the motion's opponent would bear the burden at trial on the matter that forms the basis of the motion, the opponent must come forth with evidence to show what facts are in actual dispute. A genuine factual issue exists only when there is sufficient evidence for a jury to return a verdict for the motion's opponent. Summary judgment should be granted if no reasonable jury could return a verdict for the motion's opponent.
>
> The parties cannot rest on mere allegations in the pleadings, or upon conclusory allegations in affidavits. The court must construe the facts as favorably to the non-moving party as the record will permit, and draw any permissible inferences from the materials before it in favor of the non-moving party, as long as the inferences are reasonable. The non-moving party must show that the disputed fact is material, or outcome-determinative, under applicable law.

Conery v. Bath Associates, 803 F.Supp. 1388, 1392-1393 (N.D.Ind.1992) (citations omitted).

Both parties agree that there is no material fact in genuine dispute, and that the issues presented in Counts 2 and 3 of the Miamis' complaint can be resolved completely on summary judgment.

II.

The Miamis first contend that the 1978 regulations exceed the authority of the Secretary of the Interior to regulate the acknowledgment of Indiana tribes and are thus *ultra vires*. The parties first dispute the appropriate level of deference to be given the Secretary's interpretation of his statutory authority to promulgate the 1978 regulations. The Miamis contend that the court owes no deference to the Secretary's interpretation of his authority, while the defendants contend that the court owes the Secretary's interpretation great deference.

A.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844, 104 S.Ct. 2778, 2781-2782, 81 L.Ed.2d 694 (1984), the Supreme Court stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such cases, a court may not substitute its own construction of a statutory provision for a reasonable interpretation by the administrator of an agency.

(footnotes omitted).

No statute explicitly authorizes the Secretary of the Interior to promulgate regulations concerning the acknowledgment of Indian tribes; the Secretary relied upon his general statutory authority contained in 25 U.S.C. §§ 2 and 9 when promulgating the acknowledgment regulations. 25 C.F.R. Part 83. These statutes authorize the Secretary to manage Indian affairs and prescribe necessary regulations for that purpose. 25 U.S.C. § 2, enacted in 1832, states that:

> The Commissioner of Indian affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian Affairs and of all matters arising out of Indian Affairs.

25 U.S.C. § 9, enacted in 1834, states that:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for settlement of the accounts of Indian affairs.

Using these statutes as authority, the Secretary promulgated the 1978 regulations to define what constitutes an acknowledged Indian tribe for the purposes of statutes relating to and conferring benefits upon Indian tribes. 25 C.F.R. § 83.2.

Although the Miamis assert that such authority is "tenuous," they do not contend that the Secretary is wholly unauthorized to promulgate any regulations concerning the acknowledgment of Indian tribes.[2] Rather, the Miamis contend that the Secretary exceeded his authority in promulgating these particular regulations. The Miamis contend both that the Secretary lacks statutory authority to impose different and more burdensome requirements for federal acknowledgment after 1978 than those imposed before 1978, and that the Secretary lacks statutory authority to impose any standard other than voluntary abandonment on previously recognized Indian tribes.

The Miamis challenge the Secretary's authority to promulgate the regulations as written in 1978, rather than attacking the Secretary's authority to promulgate any regulations governing tribal acknowledgment. In other words, the issue before the court is not whether the Secretary had authority to promulgate any regulations governing the acknowledgment of Indian tribes – for the Miamis concede this point – but rather whether the regulations as promulgated exceed the Secretary's statutory authority.

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[2] Indeed, the District of Columbia Court of Appeals expressly upheld the Secretary's authority to promulgate the 1978 regulations under 25 U.S.C. §§ 2 and 9. *James v. United States Dept. of Health and Human Services*, 824 F.2d 1132 (D.C.Cir.1987).

Resolution of this issue nonetheless requires a determination of whether the 1978 regulations are "legislative" or "interpretive," so that the court may determine the proper level of deference to which they are entitled. The Miamis contend that a regulation is only legislative when Congress has specifically delegated to the Secretary either express or implicit authority to prescribe a method for implementing a statute or for developing standards to give meaning to its terms. The Miamis further contend that "[b]y way of contrast, interpretive regulations are those promulgated under the agency's general authority to prescribe all needful regulations." Thus, the Miamis contend that the acknowledgment regulations necessarily are interpretive because they were promulgated under the Secretary's general authority to adopt needful regulations.

"The distinction between interpretive (or 'interpretative') and substantive (or 'legislative') rules is admittedly far from crystal-clear." *Metropolitan School District of Wayne Township v. Davila,* 969 F.2d 485, 489 (7th Cir.1992), *cert. denied,* ___ U.S. ___, 113 S.Ct. 1360, 122 L.Ed.2d 740 (1993) (*quoting Chemical Waste Management, Inc. v. United States Environmental Protection Agency,* 869 F.2d 1526, 1534

(D.C.Cir.1989)). Determining whether a rule is interpretive or legislative begins with the agency's characterization of the rule. *Id.* "The agency's characterization is not dispositive, but is a relevant factor." *Id.* (citations omitted). The court next considers the general characteristics of the rule. " '[I]nterpretive rules are statements as to what the administrative officer thinks the statute or regulation means,' whereas legislative rules have 'effects completely independent of the statute.' " *Id.* at 490 (quoting *United Technologies Corp. v. United States Environmental Protection Agency,* 821 F.2d 714, 718 (D.C.Cir.1987)).

In general, " 'Regulations,' 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretive rules are statements as to what the administrative officer thinks the statute or regulation means." *Alabama Tissue Center of the University of Alabama Health Service Foundation, P.C. v. Sullivan,* 975 F.2d 373, 377 (7th Cir.1992) (quoting *Indiana Dept. of Public Welfare v. Sullivan,* 934 F.2d 853, 856 (7th Cir.1991)). "Legislative rules are regulations that an agency has issued pursuant to a congressional delegation of authority and has promulgated in accordance with 'the normal procedures associated with force-of-law rule making,' namely, 'notice-and-comment rule making pursuant to [5 U.S.C. § 553 of the Administrative Procedures Act].' " *Hanson v. Espy,* 8 F.3d 469, 473 at n. 3 (7th Cir.1993) (quoting *Doe v. Reivitz,* 830 F.2d 1441, 1447 (7th Cir.1987), *amended,* 842 F.2d 194 (7th Cir.1988)).

Working backwards from this formulation, the Miamis do not dispute that the 1978 regulations were promulgated with the normal procedure of notice-and-comment rulemaking in accordance with 5 U.S.C. § 553 of the Administrative Procedures Act ("APA"). Thus, the remaining question is whether the 1978 regulations were promulgated pursuant to a congressional delegation of authority. At least one court has held that the 1978 regulations were promulgated pursuant to a specific delegation of authority. In *James v. United States Dept. of Health and Human Services,* 824 F.2d 1132, 1137-1138 (D.C.Cir.1987), the court noted that:

> Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. 25 U.S.C. §§ 2, 9. The purpose of the regulatory scheme set up by the Secretary of the Interior is to determine which Indian groups exist as tribes. 25 C.F.R. § 83.2
>
> * * *
>
> As noted, Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. Regulations establishing procedures for federal recognition of Indian tribes certainly come within the area of Indian affairs and relations.

Cf. Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 59 (2nd Cir.1994) (court would not determine the plaintiff's status as an Indian tribe until such determination was made by the Department of the Interior, which has the authority to promulgate regulations pursuant to 25 U.S.C. § 9, and which has created a "structured administrative process to acknowledge 'nonrecognized' Indian tribes using uniform criteria.").

The court agrees with the *James* court's conclusion that the 1978 regulations have been promulgated pursuant to authority granted in 25 U.S.C. §§ 2 and 9. *See*

James v. United States Dept. of Health and Human Services, 824 F.2d at 1137-1138. The 1978 regulations were promulgated under Congress' delegation of authority to the President and to the Secretary to prescribe regulations concerning Indian affairs and relations. *See* 25 U.S.C. §§ 2 and 9. To the extent that a regulation is considered " 'legislative' in the sense of having been promulgated pursuant to a specific grant by Congress of authority to regulate the area in question," *Archer- Daniels-Midland Co. v. United States,* 37 F.3d 321, 324 (7th Cir.1994), the court agrees that the 1978 regulations, which establish procedures for federal recognition of Indian tribes, "certainly come within the area of Indian affairs and relations." *James v. United States Dept. of Health and Human Services,* 824 F.2d at 1138.

Legislative regulations are entitled to deference under *Chevron* partially because they have been promulgated by agencies with rule-making power.

> The Supreme Court made clear in *Chevron,* 467 U.S. at 843-44, 104 S.Ct. at 2781-82, that only statutory interpretations by agencies with rule-making powers deserve substantial deference. The principal rationale underlying this deference is that in this context the agency acts as a congressional proxy; Congress develops the statutory framework and directs the agency to flesh out the operational details. But Congress typically does not permit the agency to run free in this endeavor; the Administrative Procedures Act establishes certain procedures that the agency must follow. Chief among them is the notice-and-comment provisions of the APA. 5 U.S.C. § 553. This rulemaking process bears some resemblance to the legislative process and serves to temper the resultant rules such that they are likely to withstand vigorous scrutiny. It

is this process that entitles the administrative rules to judicial deference.

Atchison, Topeka & Santa Fe Railway Co. v. Pena, 44 F.3d 437, 441-442 (7th Cir.1994).

Accordingly, the court concludes that it should give the 1978 regulations the deference deemed appropriate under *Chevron.*

B.

The first step in applying *Chevron* is to determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. at 842-43, 104 S.Ct. at 2781. Here, the purpose of the 1978 regulations is to specifically define what constitutes an "Indian tribe" for purposes of federal acknowledgment. Although Congress has passed legislation specifically directed towards "Indian tribes," the parties dispute whether Congress has spoken directly to the precise question of what constitutes an "Indian tribe."

The Miamis contend that Congress has specifically defined "Indian tribe," and that the 1978 regulations have altered Congress' intended meaning. The Miamis contend that the general statutes establishing the trust relationship between the United States and Indian tribes, beginning with 25 U.S.C. §§ 2 and 9, reveal a Congressional intent to recognize "all Indian tribes." For example, contemporaneous with its enactment of 25 U.S.C. § 9, Congress enacted a series of statutes entitled, "an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." Act of June 30, 1834, 4 Stat. 729, ch. 161 (commonly referred to as the Indian Trade and Intercourse Act or the Nonintercourse Act). Additionally, the Miamis contend that Congress intended a statute enacted in 1830 to apply to "all Indian tribes." *See* An Act to Provide for an Exchange of Lands with the Indians Residing in any of the States or Territories, and for Their Removal West of the River Mississippi, Act of May 28, 1830, ch. 148, § 2.

Some courts have read the Nonintercourse Act to apply to all Indian tribes, whether "recognized" or not. For example, in *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 (1st Cir.1975), the court stated that:

> Congress is not prevented from legislating as to tribes generally; and this appears to be what it has done in successive versions of the Nonintercourse Act. There is nothing in the Act to suggest that "tribe" is to be read to exclude a bona fide tribe not otherwise federally recognized.

(footnote omitted).

In the *Passamaquoddy Tribe* case, however, the parties agreed that the plaintiff existed as a "tribe." Thus, the question before that court was, assuming that the plaintiff was a tribe, whether the plaintiff was covered under the Nonintercourse Act if it had never been officially recognized by a specific act of Congress or by treaty. The case was decided before the promulgation of the 1978 regulations and thus could not consider the Department's regulations concerning what constitutes a bona fide tribe. Indeed, the court further stated that:

> This is not to say that if there were doubt about the tribal status of the Tribe, the judgments of officials in the federal executive branch might not be of great significance. The Supreme Court has said that, "it is the rule of this court to follow the executive and other political departments of the government, whose more special duty is to determine such affairs." *United States v. Sandoval,* 231 U.S. 28, 47 [34 S.Ct. 1, 6, 58 L.Ed. 107] (1913), *quoting United States v. Holliday,* 70 U.S. (3 Wall.) 407, 419, 18 L.Ed. 182 (1865).

528 F.2d at 377. Thus, this case acknowledges that if there are doubts concerning the tribal status of a purported tribe, the proper course of action would be to defer to the decision of the executive with authority to make such decisions.

The court agrees with the defendants that Congress has not unambiguously defined what is meant by "Indian tribe." For example, under Section 19 of the Indian Reorganization Act of 1934, 25 U.S.C. § 479, the term "Indian" is defined as all persons of Indian descent who are members of "any recognized Indian tribe now under Federal jurisdiction." The statute does not define "recognized," but defines "Tribe" as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Id.* At best, this is a circular definition. *See also* The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450b(b) (defining Indian tribe to mean "Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."); The Indian Financing Act of 1974, 25 U.S.C. § 1452(c) (defining tribe to mean "any Indian tribe, band, group, pueblo, or community . . . which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs.").

The court cannot conclude based on this record that even if Congress has manifested an intent to legislate with respect to "all Indian tribes," Congress also unambiguously intended to legislate to any group purporting to be an Indian tribe. As the defendants contend, to say that Congress has legislated with respect to all Indian tribes begs the question of "what is an Indian tribe?" The purpose of the 1978 regulations is to develop uniform standards and procedures to answer that question.

Since Congress has not directly addressed the precise question at issue:

> the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. at 843, 104 S.Ct. at 2782. Indeed, "[t]he court need not conclude that the agency's construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n. 11, 104 S.Ct. at 2782 n. 11.

When, as here, the grant of authority was implicit rather than explicit, the court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 844, 104 S.Ct. at 2782. Further, considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations

> "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."
>
> " . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute that the accommodation is not one that Congress would have sanctioned."

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. at 844-845, 104 S.Ct. at 2782-2783 (quoting *United States v. Shimer*, 367 U.S. 374, 382, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961) (citations omitted)).

The court reviews the validity of the 1978 regulations with these guidelines in mind.[3]

III.

The Miamis contend that (1) the Secretary lacks statutory authority to impose different and more burdensome requirements for federal acknowledgment after 1978 than those imposed before 1978; and (2) the Secretary lacks statutory authority to impose any standard other than voluntary abandonment on previously recognized Indian tribes. The court addresses each contention in turn.

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[3] In addition to relying upon the deference mandated by *Chevron,* the defendants also contend that the court must give the Secretary's determination as to the tribal status of an Indian tribe great deference because "the consequence of tribal status is to establish, or recognize, a political sovereignty and political relationship." *See* Defendants' Summary Judgment Motion at 12. The defendants rely upon *United States v. Holliday,* 70 U.S. (3 Wall.) 407, 419, 18 L.Ed. 182 (1865), in support of this contention:

> It is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty is to determine such affairs. If by them Indians are recognized as a tribe, this court must do the same.

Whatever its application to this case, the political question doctrine does not apply to the court's analysis with respect to these motions. Were the court to accept the defendants' contention that the political question doctrine applies, the court would need to defer to the recognition determination made by the "executive and other political departments." The issues presently before the court, however, do not address the validity of the Department's recognition determination with respect to the Miamis; that claim is raised in Count 4, which is not presently before the court.

A.

The Miamis first contend that the 1978 regulations are invalid because the Secretary lacks statutory authority to impose different and more burdensome requirements for federal acknowledgment after 1978 than those imposed before 1978. To support this contention, the Miamis primarily argue that the 1978 regulations violate Congress' plain intent to recognize all Indian tribes. The court does not find that Congress has exhibited a plain intent to recognize "all Indian tribes."

The Miamis present a detailed history of standards that different entities have employed to determine tribal status. For example, the Miamis rely upon the Supreme Court's definition of an Indian tribe in 1901: "By tribe, we understand a body of Indians of the same or similar race, united in a community under one leadership or government and inhabiting a particular, though sometimes ill-defined, territory." *Montoya v. United States,* 180 U.S. 261, 266, 21 S.Ct. 358, 359, 45 L.Ed. 521 (1901); *see also United States v. Candelaria,* 271 U.S. 432, 439, 46 S.Ct. 561, 562, 70 L.Ed. 1023 (1926) (using the *Montoya* definition with respect to the Indian Trade and Intercourse Act).

The Miamis also refer the court to criteria expressed in a 1942 treatise by Felix Cohen, then Assistant Solicitor of the Department of the Interior, that summarized considerations previously relied upon by the Department in considering which groups constituted Indian tribes:

> The considerations which, singly or jointly, have been particularly relied upon in reaching the conclusion that a group constitutes a "tribe" or "band" have been:

> (1) That the group has had treaty relations with the United States.
>
> (2) That the group has been denominated a tribe by act of Congress or Executive Order.
>
> (3) That the group has been treated as having collective rights in tribal lands or funds, even though not expressly designated a tribe.
>
> (4) That the group has been treated as a tribe or band by other Indian tribes.
>
> (5) That the group has exercised political authority over its members, through a tribal council or other governmental forms. Other factors considered, though not conclusive, are the existence of special appropriation items of the group and the social solidarity of the group.

Felix Cohen, *Handbook of Federal Indian Law* 271 (1942).

Finally, the Miamis cite the recommendations of Task Force Eleven of the American Indian Policy Review Commission as the "last indication of Congress' intent regarding recognition of Indian tribes." According to the Miamis, the Commission's recommendations were based on two premises: "first, that in the Indian Trade and Intercourse Act and other Indian statutes of general application, the Congress intended to recognize all Indian tribes; and second, that the Department of the Interior lacked statutory authority to recognize tribes that had not been specifically recognized by Congress at some point in history."

The Miamis contend that all of these standards are radically different from those imposed by the 1978 regulations and, therefore, violate clear Congressional intent that all Indian tribes be recognized. The Miamis contend that the 1978 regulations impermissibly violated this intent in three ways: (1) the criteria became mandatory, rather than permissive; (2) the burden of proof was increased so that Indian tribes must provide proof from the time of first white contact of a group's Indian identity, community and political influence; and (3) the community requirement was increased dramatically.

As previously discussed, however, Congress has not unambiguously expressed an intent that all Indian tribes be recognized, much less that all groups claiming to be Indian tribes be recognized as such. The report of Task Force Eleven of the American Indian Policy Review Commission does not, as the Miamis contend, serve as an indication of Congressional intent because the report was made for, not by, Congress. Likewise, case law and past practices of the Department suggesting what constitutes an Indian tribe do not serve as indications that Congress' clear intent was to recognize all Indian tribes.

The court must "not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 843, 104 S.Ct. at 2782. Thus, in this case, the court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.*

In light of this standard, the court cannot conclude that the Secretary exceeded his statutory authority in promulgating the 1978 regulations. Congress has not manifested an unambiguous intent to recognize all Indian tribes. Congress has delegated authority to the Secretary to prescribe regulations governing Indian affairs and regulations, and pursuant to that authority, the Secretary promulgated the 1978 regulations in an attempt to define what constitutes an Indian tribe. That the Secretary elected to promulgate regulations that allegedly differ from past practices is not enough to render that decision impermissible. The court cannot substitute its own construction of the relevant statutory provisions for a reasonable interpretation made by the Secretary, so the Miamis' claim that the Secretary exceeded his authority simply by changing the standards in 1978 must necessarily fail.

B.

The Miamis also contend that the 1978 regulations are invalid because the Secretary lacks statutory authority to impose any standard other than voluntary abandonment on previously recognized Indian tribes. Generally, the Miamis contend that the tribal abandonment standard governs previously recognized Indian tribes, so that if a tribe can prove lineal descent from the treaty tribe and continuous tribal organization, it is entitled to a presumption of continuous tribal existence. The Miamis cite no statutory authority for what appears to be a court-made doctrine. *See, e.g., The Kansas Indians,* 72 U.S. (5 Wall.) 737, 757, 18 L.Ed. 667 (1866) ("conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization"); *Native Village of Venetie I.R.A. Council v. Alaska,* 944 F.2d 548, 557 (9th Cir.1991) ("In general, we have continued to recognize tribal existence unless the tribe has voluntarily sought, and achieved, assimilation into non-Indian culture.").

Assuming for the purposes of this motion that the tribal abandonment standard could result in a presumption of continued existence, the court cannot conclude that the 1978 regulations are invalid merely for not explicitly including this standard into their rules. The purpose of the 1978 regulations is to establish a system whereby the Department of the Interior can determine which groups of Indians continue to exist as tribes. Any difference between "tribal abandonment" or "continuous existence" is merely a matter of semantics: if the regulations establish a permissible method for determining that a group continues to exist as an Indian tribe, then the regulations must also implicitly establish a method for determining whether the tribe has been abandoned.

Even if the 1978 regulations foreclosed the presumption of continued existence that the Miamis contend the tribal abandonment standard would afford them, it would not mean that the Secretary exceeded his statutory authority in promulgating them. The tribal abandonment standard is not a legislative creation, and the Secretary was not bound to include it in the regulations unless failure to do so would have been unreasonable.

By July 3, 1978, when the comment period on the second draft of the proposed regulations closed, the Department had held:

> [A] total of 400 meetings, discussions and conversations about Federal acknowledgment with other Federal agencies, State government officials, tribal

> representatives, petitioners, congressional staff members and legal representatives of petitioning groups; 60 written comments on the initial proposed regulations of June 16, 1977; a national conference on Federal acknowledgment attended by approximately 350 representatives of Indian tribes and organizations; and 34 comments on the revised proposed regulations published on June 1, 1978.

43 Fed.Reg. 39,361 (1978). The Secretary explicitly stated in the 1978 revised draft of the proposed regulations that "while all the approaches appeared to be viable, there is no single 'best approach.' The following regulations, therefore, are a composite of what we consider to be the best and generally most acceptable thought put forth." *Id.*

Although there is no indication whether the Secretary specifically considered the inclusion of the abandonment standard into the final 1978 regulations, the Secretary made reasonable efforts to include the criteria he deemed necessary. The court will not invalidate the Secretary's reasonable interpretation of the applicable statutes. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 844, 104 S.Ct. at 2782. The Miamis' claim that the Secretary exceeded his authority by not explicitly including the tribal abandonment standard in the 1978 regulations must also fail.

The Secretary did not exceed his statutory authority in promulgating the 1978 regulations. With respect to this claim, the Miamis' motion for summary judgment must be denied, and the defendants' motion for summary judgment must be granted.

IV.

The Miamis next contend that the 1978 regulations failed to explain the policy issues raised and the policy choices the Secretary made in promulgating the regulations. The Miamis contend that the APA, 5 U.S.C. § 553, required the Secretary "to take certain steps including the incorporation in the regulations of a 'concise general statement of their basis and purpose,' " and that the statement included in the 1978 regulations "is entirely deficient." The Miamis allege several different ways the 1978 regulations' statement of basis and purpose is defective.

The defendants contend that these claims are barred by the applicable six-year statute of limitations for procedural or policy-based attacks on the regulations. *See* 28 U.S.C. § 2401. The defendants previously filed a motion to dismiss Counts 2 and 3 of the complaint making this same contention; the court ruled in July 1994 that the statute of limitations did not bar the claims contained within those counts because they are essentially substantive, rather than procedural, challenges to the 1978 regulations. The Miamis now assert that decision in defense of its claims that the 1978 regulations failed to explain the policy issues raised and the policy choices made by the Secretary.

In its order on the defendants' motion to dismiss, the court relied heavily upon the Ninth Circuit's decision in *Wind River Mining Corp. v. United States,* 946 F.2d 710 (9th Cir.1991), to hold that Counts 2 and 3 of the complaint were substantive challenges to the regulations, and that the six-year statute of limitations thus began to run when the Miamis' petition for acknowledgment was denied in 1992. However, the *Wind River Case* stands for the equally sound principal that:

> If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision. Similarly, if the person wishes to bring a policy-based facial challenge to the government's decision, that too must be brought within six years of the decision. This result- . . . would make the most sense.

946 F.2d at 715.

The court does not believe, with respect to the Miamis' contentions concerning "policy issues raised and the policy choices made," that it is bound by its earlier denial of the defendants' motion to dismiss. That decision was based entirely upon a reading of the complaint and the parties' briefs; the parties' summary judgment motions were not before the court. The Miamis' complaint and briefs on the motion to dismiss did not suggest that they intended to raise issues concerning the "policy issues raised and the policy choices made" by the Secretary or concerning the sufficiency of the statement of basis and purpose.

These contentions are either a challenge to procedural violations in the adoption of the regulations or a policy-based facial challenge to the government's decisions. As such, they should have been brought within six years of the promulgation of the regulations. *Wind River Mining Corp. v. United States,* 946 F.2d at 715. Therefore, leaving aside any issues concerning whether the Miamis could actually bring these contentions under the complaint as written, the applicable statute of limitations bars such contentions.

V.

The Miamis next contend that the Secretary acted arbitrarily, capriciously, and without rational basis in promulgating the 1978 regulations. The Miamis bring this contention under 5 U.S.C. § 706(2)(A) of the APA, which limits the court's review of the regulations promulgated under 5 U.S.C. § 553 to whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Under this standard, "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983).

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choices made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider,

> entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id.

The Miamis contend that the 1978 regulations are arbitrary and capricious under this standard because they (1) change the criteria that were previously used to recognize tribes without explaining the change in policy; (2) do not provide petitioners or decisionmakers with sufficient guidance in preparing or reviewing petitions because they do not define key terms or specify a burden of proof; and (3) do not provide for a formal hearing including the opportunity to cross-examine the government's experts or for an independent review of the government's final determination.

A.

The Miamis first contend that the 1978 regulations are arbitrary and capricious because they changed the criteria that were previously used to recognize tribes and fail to explain the change in policy, citing *Local 777, Democratic Union Organizing Committee v. National Labor Relations Board*, 603 F.2d 862, 882 (D.C.Cir.1978) ("Although an agency may change its policy . . . when, as here it announces no principled reason for such a reversal, its action is arbitrary and capricious."), and *National Labor Relations Board v. Indianapolis Mack Sales and Service, Inc.*, 802 F.2d 280, 284 (7th Cir.1986) ("When an agency changes course, a reviewing court must be satisfied that the agency was aware of, and has given sound reasons for, the change, and that it has shown that the new rule is consistent with the statutory duties."). The Miamis also contend that the change in policy creates a possibility of disparate treatment of similarly situated groups that is arbitrary and capricious, citing *Keen Transport, Inc. v. United States,* 446 F.Supp. 5, 8 (N.D.Ohio 1976).

The Miamis' primary complaint is that under the 1978 regulations, the criteria became mandatory rather than permissive, the burden of proof was increased so that Indian tribes must provide proof from the time of first white contact of a group's Indian identity, community and political influence, and the community requirement was increased dramatically. The defendants dispute whether any of these components of the 1978 regulations actually constitute a change in policy.

Before 1978, the Department considered acknowledgment requests on a case-by-case basis. The defendants agree with the Miamis that those determinations were made taking into consideration, among other things, the criteria outlined by Felix Cohen in the *Handbook of Federal Indian Law,* as previously discussed. An increase in the number of acknowledgment requests in the 1970's "necessitate[d] the development of procedures to enable the Department to take a uniform approach in their evaluation." 43 Fed.Reg. 39,361 (1978). Thus, through an informal rulemaking procedure pursuant to 5 U.S.C. § 553 of the APA, the Department promulgated the 1978 regulations to serve this goal.

Viewing the 1978 regulations as a whole, the court cannot conclude, as the Miamis contend, that they are arbitrary and capricious because of unannounced changes in policy. The court is hesitant to conclude that the 1978 regulations constitute the type of reversal in Department policy envisioned by the case law cited by the Miamis. *Local 777 v. NLRB,* 603 F.2d at 882, and *NLRB v. Indianapolis Mack,* 802 F.2d at 284, both involved decisions by the National Labor Relations Board that ran counter to "longstanding rules" as applied by the Board. In contrast, this case involves the initial promulgation of regulations in a field that was devoid of uniform rules. Certainly, to the extent that the Department previously had no official, uniform policy for making acknowledgment determinations, the 1978 regulations constitute a change in policy. Policy decisions do not become unannounced policy changes, however, simply because the Secretary elects to require satisfaction of all the enumerated criteria or to require proof of continuous existence and community identity.

Both parties agree that before the promulgation of the 1978 regulations, acknowledgment determinations were made on an ad hoc basis. In addition, the defendants have demonstrated that all of the components to which the Miamis now object appeared in various prior acknowledgment decisions made by the Department. Finally, the record reflects that the Department took into consideration many of the comments received by it during the informal rulemaking process and included suggestions made in many of those comments in the 1978 regulations. As such, the court finds that the 1978 regulations are not arbitrary and capricious because of an unannounced change in policy.

B.

The Miamis also contend that the regulations are arbitrary and capricious because they do not provide petitioners or decisionmakers with sufficient guidance in preparing or reviewing petitions because they fail to define key terms and fail to specify a burden of proof. The Miamis argue that the following terms are vague and undefined: "maintained tribal relations" in 25 C.F.R. § 83.1(k); "maintenance of tribal relations" in § 83.1(*o*); "substantially" and "substantial" in §§ 83.3(a), 83.7(a) and 83.7(b); "reasonable proximity" in § 83.1(*o*); "specific area" in § 83.7(b); and "tribal political influence" in § 83.7(c). The Miamis also contend that the regulations do not explain the level of proof necessary to establish facts or criteria under the regulations.

The Miamis merely state that these alleged failures are arbitrary and capricious; they do nothing more to convince the court to so conclude. Under the arbitrary and capricious standard, the court must "determine whether the agency's determination 'was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' " *Head Start Family Education Program, Inc. v. Cooperative Educational Service Agency 11*, 46 F.3d 629, 633 (7th Cir.1995) (quoting *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. at 43, 103 S.Ct. at 2866-2867). The court already has determined that the Department extensively considered the relevant factors and comments when promulgating the 1978 regulations. The court cannot impose its own policy choices when those choices are left to the Secretary's discretion. *See, e.g., American Trucking Ass'n, Inc. v. United States*, 755 F.2d

1292, 1298-99 (7th Cir.1985). The regulations are not arbitrary and capricious simply because the Miamis contend that a few terms are vague or because the burden of proof is unclear.

C.

Finally, the Miamis contend that the regulations are arbitrary and capricious because they do not provide for a formal hearing, including the opportunity to cross-examine the government's experts, or for an independent review of the government's final determination. The division within the Department that processes all recognition petitions is the Bureau of Indian Affairs ("BIA"). Within the BIA, the petitions are extensively reviewed by the Branch of Acknowledgment and Research ("BAR") by a team of historians, anthropologists and genealogists. The Miamis contend that because the initial review and acknowledgment determination is made in the BAR by these experts, the review process is essentially hidden from the petitioner and that the petitioner should thus be afforded a hearing with an opportunity to cross-examine the BAR experts who worked on the petition.

The Miamis cite *Wallace v. Bowen*, 869 F.2d 187, 192 (3rd Cir.1988), in support of this theory that failure to provide for cross-examination renders the regulations arbitrary and capricious. *Wallace v. Bowen* is distinguishable, however, because in that case the court interpreted the regulations in light of the statute authorizing its promulgation and determined that "it is unmistakable under the statute that the Secretary may not rely on post-hearing reports without giving the claimant an opportunity to cross-examine the authors of such reports, when such cross-examination may be required for a full and true disclosure of the facts." 869 F.2d at 192 (interpreting 42 U.S.C. § 405(b)(1)).

An examination of the statutes that authorized the 1978 regulations does not reveal an intent on the part of Congress to require a hearing and opportunity for cross-examination. The 1978 regulations were promulgated under the informal rulemaking procedure pursuant to 5 U.S.C. § 553 of the APA:

> The Administrative Procedure Act makes clear that notice of the scope and general thrust of the proposed rule, and an opportunity to submit written comments, are all the procedure that an agency engaged in "informal rulemaking" is required to provide. An evidentiary hearing is not required.

United Air Lines, Inc. v. Civil Aeronautics Board, 766 F.2d 1107, 1116 (7th Cir.1985).

The Miamis suggest many valid reasons why a hearing and opportunity for cross-examination may be preferable in this instance, and refer the court to testimony from past BAR employees who have suggested the same. The Miamis submit the written testimony of three former BAR employees submitted to the House Subcommittee on Native American Affairs in 1994, which indicate, among other things, that because the BAR employees who review recognition petitions have no guidance with respect to how to make their determinations, petitioning groups should be afforded an evidentiary hearing and an opportunity to cross-examine witnesses. *See, e.g.*, Testimony of Karen Cantrell, July 22, 1994, Plaintiffs' Exh. 4.

The court is not to impose its own policy choices upon the regulations, however; the court's review is limited to whether the regulations are arbitrary and capricious. Because the APA does not mandate a hearing and opportunity for cross-examination, and because Congress has not manifested an intent to provide such procedures, the absence of a provision for such procedures does not render the 1978 regulations arbitrary and capricious under 5 U.S.C. § 706(2)(A).

The 1978 regulations have been promulgated in accordance with law and are not arbitrary, capricious or without rational basis. *See* 5 U.S.C. § 706(2)(A). The Miamis' motion for summary judgment must be denied, and the defendants' motion for summary judgment must be granted, with respect to this claim.

VI.

The Miamis' last claim is that the 1978 regulations do not meet constitutional requirements. The Miamis contend that the regulations do not afford petitioners procedural due process, that the regulations violate substantive due process, and that the regulations violate the equal protection component of the Fifth Amendment.

A.

The Miamis first contend that the 1978 regulations do not afford groups petitioning for acknowledgment procedural due process. "Before [the Miamis] may assert a due process claim, be it procedural or substantive, [they] must establish that [they] have a 'legitimate claim of entitlement' to the right being asserted." *Harris v. City of*

Auburn, 27 F.3d 1284, 1285-86 (7th Cir.1994) (quoting *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)).

The Miamis do not contend in this argument that their procedural due process rights were violated as a result of the Department's decision to not acknowledge their existence as an Indian tribe. Rather, the Miamis contend that the 1978 regulations are violative of procedural due process on their face. To support this contention, the Miamis argue that any Indian tribe applying for recognition under the 1978 regulations has an entitlement because the regulations set specific criteria and restrict the discretion of the decisionmaker. *See* 25 C.F.R. § 83.9(i) (the Secretary "shall acknowledge the existence of the petitioner as an Indian tribe when it is determined that the group satisfies the criteria in § 83.7.").

With respect to what constitutes a legitimate claim of entitlement protected by due process, the Seventh Circuit has stated:

> This circuit has on occasion been guided by Judge Hufstedler's definition of "legitimate claim of entitlement." *See Geneva Towers Tenants Organization v. Federated Mortgage Investors,* 504 F.2d 483, 495-96 (9th Cir.1974) (Hufstedler, J., dissenting) ("An entitlement is a legally enforceable interest in receiving a governmentally conferred benefit, the initial receipt or termination of which is conditioned upon the existence of a controvertible and controverted fact.") As reformulated by this court, the rule states that a "legitimate claim of entitlement is created only when the statutes or regulations in question establish a framework of factual conditions delimiting entitlement which are capable of being explored at a due

> process hearing." *Eidson v. Pierce,* 745 F.2d 453, 459-60 (7th Cir.1984). More plainly, it means "an entitlement that stands or falls on the application of rules to facts." *Scott v. Village of Kewaskum,* 786 F.2d 338, 339-40 (7th Cir.1986).

Cornelius v. LaCroix, 838 F.2d 207, 210 (7th Cir.1988).

When discussing due process under the Fourteenth Amendment, the Seventh Circuit has stated that it will find a liberty interest in a state statute or regulation

> only if the state's statute or regulation uses "language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will' or 'must' be employed," and contains substantive standards or criteria for decisionmaking as opposed to vague standards that leave the decisionmaker with unfettered discretion.

Kraushaar v. Flanigan, 45 F.3d 1040, 1048 (7th Cir.1995) (quoting *Hewitt v. Helms,* 459 U.S. 460, 471, 103 S.Ct. 864, 871, 74 L.Ed.2d 675 (1983), and citing *Miller v. Henman,* 804 F.2d 421, 427 (7th Cir.1986), *cert. denied,* 484 U.S. 844, 108 S.Ct. 136, 98 L.Ed.2d 93 (1987)).

However, "[t]he Supreme Court has 'never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause.' " *Dehainaut v. Pena,* 32 F.3d 1066, 1074 (7th Cir.1994), *cert. denied,* ___ U.S. ___, 115 S.Ct. 1427, 131 L.Ed.2d 309 (1995) (quoting *Lyng v. Payne,* 476 U.S. 926, 942, 106 S.Ct. 2333, 2343, 90 L.Ed.2d 921 (1986)). Indeed, the Seventh Circuit has "repeatedly rejected the notion that any and all state . . . rules and regulations containing such language automatically create 'legitimate claims of entitlement' triggering the procedural protections of the due process clause." *Colon v. Schneider,* 899 F.2d 660, 667 (7th Cir.1990). Instead, "[s]ome statutes and regulations create only guidelines that direct the manner in which state personnel exercise their discretion to perform certain activities. These types of guidelines do not create substantive rights or legally enforceable expectancies." *Kraushaar v. Flanigan,* 45 F.3d at 1048 (citing *Miller v. Henman,* 804 F.2d at 424).

The court must look to the regulations to determine whether a legitimate claim of entitlement has been established. *Thornton v. Barnes,* 890 F.2d 1380, 1386 (7th Cir.1989). Under the standards just discussed, the 1978 regulations do not create a legitimate claim to entitlement. As the Miamis contend, § 83.9(i) of the 1978 regulations states that the Assistant Secretary "shall acknowledge the existence of the petitioner as an Indian tribe when it is determined that the group satisfies the criteria in § 83.7." 25 C.F.R. § 83.9(i). The mandatory nature of this language suggests that if the Assistant Secretary has found that the petitioning group has satisfied all of the criteria in § 83.7, the Assistant Secretary has no discretion to refuse to extend federal recognition to the petitioner.

The regulation cited by the Miamis, however, does not restrict the Assistant Secretary's discretion to determine whether those factors have been met. For example, § 83.9, which governs the Department's processing of a group's petition for acknowledgment, also states that:

> Upon receipt of a petition, the Assistant Secretary shall cause a review to be conducted to determine whether the petitioner is entitled to be acknowledged as an Indian tribe. The review shall include a consideration of the petition and supporting evidence, and the factual statements contained therein. The Assistant Secretary may also initiate other research by his staff, for any purpose relative to analyzing the petition and obtaining additional information about the petitioner's status, and may consider any evidence which may be submitted by other parties.

25 C.F.R. § 83.9(a). This language provides the Assistant Secretary, when applying the criteria to a petitioner, discretion both to view evidence from various sources and to initiate supplementary research. Although the Assistant Secretary has no discretion to refuse federal recognition once he has determined that the § 83.7 criteria have been met, the Assistant Secretary nonetheless is vested with discretion to determine whether those criteria have been met. Therefore, the 1978 regulations do not create a legitimate claim to entitlement protected by due process.[4]

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[4] In support of their procedural due process arguments, the Miamis rely heavily upon the court's opinion in *Greene v. Lujan*, No. C89-645Z, 1992 WL 533059, 1992 U.S.Dist.LEXIS 21737 (W.D.Wash. Feb. 25, 1992). That case is distinguishable, however, because the court concluded that the plaintiff had a protected property interest solely because its members had been receiving federal benefits until a series of statutes were passed in the 1970's requiring federal recognition as a prerequisite to receiving benefits; the court did not discuss whether the 1978 regulations created a legitimate claim to entitlement. Additionally, the court previously had concluded that the 1978 regulations were not unconstitutional on their face.

Accordingly, the Miamis' motion for summary judgment must be denied, and the defendants' motion for summary judgment must be granted, as to the Miamis' procedural due process claim.

B.

The Miamis also contend that the 1978 regulations violate substantive due process. While procedural due process assures fair procedure in the decision-making process, substantive due process "is concerned with the decision itself." *Employers Insurance of Wausau v. Browner,* 848 F.Supp. 1369, 1377 (N.D.Ill.1994) (quoting *Universal Security Insurance Co. v. Koefoed,* 775 F.Supp. 240 (N.D.Ill.1991)). The Seventh Circuit has stated that to establish a substantive due process claim, "in addition to alleging that the decision was arbitrary and irrational, 'the plaintiff must also show either a separate constitutional violation or the inadequacy of state law remedies.' " *New Burnham Prairie Homes v. Village of Burnham,* 910 F.2d 1474, 1481 (7th Cir.1990) (citations omitted); *see also Employers Insurance of Wausau v. Browner,* 848 F.Supp. at 1377 n. 14 (although *New Burnham* dealt with state-based property rights, "there is no reason that the Seventh Circuit's requirements would not apply equally to claims based upon federal law").

The Seventh Circuit has expressed reluctance in expanding substantive due process jurisprudence. *See, e.g., National Paint & Coatings Association v. City of Chicago,* 45 F.3d 1124, 1129 (7th Cir.1995) ("Now we have spent some time looking through the Constitution for the Substantive Due Process Clause without finding it."); *Illinois*

Psychological Ass'n v. Falk, 818 F.2d 1337, 1342 (7th Cir.1987) (noting the "oxymoron of substantive due process"). Indeed, "[t]he fact that it is a doctrine owing its existence to constitutional structure rather than a clear grant of power to the judiciary has led the Supreme Court to be cautious in its use." *National Paint & Coatings Association v. City of Chicago,* 45 F.3d at 1129 (citing *Albright v. Oliver,* ___ U.S. ___, ___, 114 S.Ct. 807, 812-13, 127 L.Ed.2d 114 (1994) (plurality opinion)). The Miamis' sole ground for their substantive due process contention is that regulations that have been found to be arbitrary and capricious must also violate substantive due process. Having previously found that the 1978 regulations are not arbitrary and capricious under 5 U.S.C. § 706(2)(A), the court concludes that the 1978 regulations do not violate substantive due process.

With respect to this claim, the Miamis' motion for summary judgment must be denied, and the defendants' motion for summary judgment must be granted.

C.

The Miamis' final contention in their summary judgment motion is that the 1978 regulations violate equal protection. The Miamis contend that the 1978 regulations violate equal protection "by imposing more onerous standards to petitions for acknowledgment processed after 1978 than those processed before 1978." The Miamis assert that the 1978 regulations must undergo strict scrutiny because they "impact on non-federally recognized tribes' freedom of association." The Seventh Circuit holds that "in order to assert a constitutional claim based on violation of equal protection, a complaining party must assert disparate treatment based on their membership in a particular group." *New Burnham Prairie Homes v. Village of Burnham,* 910 F.2d at 1481.

The Miamis' equal protection claim must fail as a matter of law. The court cannot agree that the 1978 regulations are subject to strict scrutiny because they impinge upon the freedom of association rights of non-federally recognized tribes. Certainly, as the Miamis contend, non-recognition carries a heavy price for a petitioning group because the group will be ineligible for many government benefits. This negative impact of non-recognition does not mean, however, that the 1978 regulations affect the freedom of association rights of those groups.

The court need only determine whether the

> classification is irrational, invidious, or otherwise predicated on impermissible criteria: "If the government classification relates to a proper governmental purpose, then the classification will be upheld. . . . Those who are treated less favorably by the legislation are not denied equal protection of the law because they are not similarly situated to those who receive the benefit of the legislative classification."

Hassan v. Wright, 45 F.3d 1063, 1068 (7th Cir.1995) (quoting Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law, Substance and Procedure* § 18.2 at 7 (2nd ed. 1992)). When reviewing class distinctions not pertaining to a fundamental right or a suspect class, the court's "review is limited to determining whether the statute is rationally related to legitimate legislative goals." *Lindley v. Sullivan,* 889 F.2d 124, 132 (7th Cir.1989); *see also Hassan v. Wright,* 45 F.3d at 1068.

The 1978 regulations withstand this minimum scrutiny. The 1978 regulations were promulgated with the legitimate purpose of standardizing the process for federal recognition of Indian tribes. The Miamis merely contend that the regulations are not rationally related to that goal because they impose stricter standards after 1978 than before 1978. Of course, as previously discussed, decisions with respect to tribal recognition before the promulgation of the 1978 regulations were made on an ad hoc basis. The court already has concluded that the regulations are in accordance with law and are not arbitrary, capricious, or without rational basis. Consistent with that finding, the court finds that the 1978 regulations are rationally related to a legitimate government purpose, and therefore comport with equal protection. *See Lindley v. Sullivan,* 889 F.2d at 132.

Accordingly, with respect to this claim, the Miamis' motion for summary judgment must be denied, and the defendants' motion for summary judgment must be granted.

VII.

Contending that the defendants have not produced certain items in the administrative record, the Miamis also seek an order directing the government to complete the administrative record. Contending that the Miamis failed to comply with District Rule 37.1, the defendants filed a motion to strike or deny the Miamis' motion for an order directing the government to complete the administrative record. Alternatively, the defendants seek an extension of time to respond to the plaintiffs' motion.

District Rule 37.1 specifically states that:

> The court may deny any discovery motion . . . unless counsel for the moving party files with the court, at the time of filing the motion, a separate statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorney(s) on the matter(s) set forth in the motion.
>
> The statement shall recite, in addition, the date, time, and place of such conference and the names of all parties participating therein. . . .

N.D.Ind.L.R. 37.1. *See also* Fed.R.Civ.P. 37(a)(2)(B).

The Miamis contend that their motion is not actually a discovery motion, but rather is a motion "to direct the government to complete an obviously deficient administrative record." The defendants contend that the motion is truly a discovery motion because it requests permission to conduct additional discovery and essentially requests the court to compel the defendants to produce any documents that have not yet been produced but belong in the administrative record. The defendants further contend that "[t]he obvious purpose of L.R. 37.1 is to force discovery dispute resolution and avoid wasting the Court's (and the parties') time with wasteful motions practice on otherwise soluble matters."

The court agrees with both of the defendants' contentions. Although the Miamis' motion is not fashioned as a discovery motion, the relief it seeks reveals that, in essence, it constitutes the type of motion governed by District Rule 37.1 – that is, "any discovery motion." Further, the court agrees that the purpose of District Rule 37.1 is to require the parties to at least attempt resolution of discovery disputes before bringing them to the court for disposition. In light of the many indications the defendants have made in their motion to strike and in their reply brief that they are willing to discuss the issues raised by the Miamis, it does not appear that compliance with District Rule 37.1 would be an act of futility. Thus, the court grants the defendants' motion to strike the Miamis' motion for an order directing the government to complete the administrative record. The Miamis' motion for an order directing the government to complete the administrative record is stricken, without prejudice to refile exhibiting compliance with District Rule 37.1.

VIII.

In conclusion, the court:

(1) DENIES the plaintiffs' motion for partial summary judgment (filed August 1, 1994 (# 93));

(2) GRANTS the defendants' motion for partial summary judgment (filed October 5, 1994 (# 104));

(3) DENIES the plaintiffs' motion for a hearing (filed August 1, 1994 (# 92));

(4) GRANTS the defendants' motions to strike or deny plaintiffs' motion for discovery (filed January 9, 1995 (# 116-1)) and DENIES AS MOOT the defendants' alternative motion to extend time to respond to the plaintiffs' motion for discovery (filed January 9, 1995 (# 116-2)); and

(5) STRIKES the plaintiffs' motion for an order directing the government to complete the administrative record (filed December 27, 1994 (# 113)),

without prejudice to refile exhibiting compliance with Local Rule 37.1.

SO ORDERED.

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 6, 2001

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Richard A. Posner, *Circuit Judge*

Hon. John L. Coffey, *Circuit Judge*

No. 00-3465

MIAMI NATION OF INDIANS OF INDIANA, INCORPORATED, also known as MIAMI NATION OF INDIANA and MIAMI INDIANS OF INDIANA, and PAUL STRACK, in his capacity as Chief of the Miami Nation of Indians of the State of Indiana, Inc.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, Bureau of Indian Affairs, Branch of Acknowledgment and Research, UNITED STATES OF AMERICA, and GALE A. NORTON, in her capacity as

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.

No. 92 C 586

Robert L. Miller, Jr.
Judge

Secretary of the Department of the Interior,
Defendants-Appellees.

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed on July 30, 2001 by plaintiffs-appellants and on August 22, 2001 defendants-appellees filed an answer. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED**.

APPENDIX D

TREATY WITH THE MIAMI, June 5, 1854

II Kapp. 641 (GPO 1904)

Articles of agreement and convention made and concluded at the city of Washington, this fifth day of June, one thousand eight hundred and fifty-four, between George W. Manypenny, commissioner on the part of the United States, and all the following-named delegates representing the Miami tribe of Indians, viz: Nah-we-lan-quah, or Big Legs; Ma-cat-a-chin-quah, or Little Doctor; Lan-a-pincha, or Jack Hackley; So-ne-lan-gish-eah, or John Bowrie; and Wan-zop-e-ah; they being thereto duly authorized by said tribe – and Me-shin-go-me-zia, Po-con-ge-ah, Pim-yi-oh-te-mah, Wop-pop-pe-tah, or Bondy, and Ke-ah-cot-woh, or Buffalo, Miami Indians, residents of the State of Indiana, being present, and assenting, approving, agreeing to, and confirming said articles of agreement and convention.

ARTICLE 1. The said Miami Indians hereby cede and convey to the United States, all that certain tract of country set apart and assigned to the said tribe, by the article added by the Senate of the United States, by resolution of the date of February twenty-fifth, one thousand eight hundred and forty-one, to the treaty of November twenty-eighth, one thousand eight hundred and forty, and denominated among the amendments of the Senate as "Article 12," which was assented to by said Indians, on the fifteenth day of May, one thousand eight hundred and forty-one; which tract is designated in said article as "bounded on the east by the State of Missouri, and on the north by the country of the Weas and Piankeshaws, on the west by the Pottowatomies of Indiana, and on the south by the land assigned to the New York Indians, estimated to contain five hundred thousand acres," excepting and reserving therefrom seventy thousand acres for their future homes, and also a section of six hundred and forty acres for school purposes, to be selected and assigned to said tribe as hereinafter provided.

ARTICLE 2. The United States shall, as soon as it can conveniently be done, cause the lands herein ceded and reserved, to be surveyed, as the Government lands are surveyed, the Miamis bearing the expense of survey of the reserved lands; and within four months after the approval of such surveys, each individual or head of a family of the Miami tribe, now residing on said lands, shall select, if a single person, two hundred acres; and if the head of a family; a quantity equal to two hundred acres for each member of the family; which selections shall be so made as to include in each case, as far as practicable, the present residences and improvements of each person or family, and, where it is not practicable, the selection shall fall on lands in the same neighborhood. And if, by reason of absence or otherwise, any single person, or head of a family, entitled to lands as aforesaid, shall fail to make his or her selection within the period prescribed, the chiefs of the tribe shall proceed to select the lands for those thus in default. The chiefs shall also select the six hundred and forty acres hereinbefore reserved for their school, to include the buildings erected for school purposes, and to embrace a sufficient portion of timber-land. After all of the before-named selections shall have been made, the said chiefs shall further proceed to select, in a compact body, and contiguous to the individual reservations, the residue of the seventy thousand acres accepted and reserved by the preceding article, which body of land shall be held as the common property of the tribe, but may, at any time, when the chiefs and a majority of the tribe request it, be sold by the President, in the manner that public lands of the United States are sold, and the proceeds, after deducting the expense of such sale, be paid to the tribe, under the direction of the President, and in such mode as he may prescribe: *Provided,* That if any single person or family entitled to land, shall have been overlooked, or wrongfully excluded, and shall make the fact appear to the satisfaction of the chiefs, such person or family may, with the approbation of the Commissioner of Indian Affairs, receive their quantity, by the rule prescribed in this article, out of the tract to be thus selected and held as the common property of the tribe. All the selections herein provided for, shall, as far as practicable, be made in conformity with the legal subdivisions of United States lands, and immediately reported to the agent of the tribe, with apt descriptions of the same, and the President may cause patents to issue to single persons or heads of families for the lands selected by or for them, subject to such restrictions respecting leases and alienation as the President or Congress of the United States may impose; and the lands so patented shall not be liable to levy, sale, execution, or forfeiture; *Provided,* That the legislature of a State within which the ceded country may be hereafter embraced may, with the assent of Congress, remove these restrictions. When selections are so made, or attempted to be made, as to produce injury to, or controversies between, individuals, which cannot be settled by the parties, the matters of difficulty shall be investigated and decided on equitable terms, by the chiefs of the tribe, subject to appeal to the agent, whose decision shall be final.

ARTICLE 3. In consideration of the cession hereinbefore made, the United States agree to pay to the Miami tribe of Indians the sum of two hundred thousand dollars, in manner as follows, viz: Twenty annual instalments of seven thousand five hundred dollars each, the first payable on the first day of October, one thousand eight hundred and sixty, and the remainder to be paid respectively on the first day of October of each succeeding year, until the whole shall have been paid; and the remaining fifty thousand dollars shall be invested by the President in safe and profitable stocks, the interest thereon to be applied, under his direction, for educational purposes, or such objects of a beneficial character, for the good of the tribe, as may be considered necessary and expedient; and hereafter, whenever the President shall think proper; the sum thus provided to be invested, may be converted into money, and the same paid to the tribe in such manner as he may judge to be best for their interests. No part of the moneys in this or the preceding article mentioned shall ever be appropriated or paid to the persons, families, or bands, who, by the fourteenth article of the treaty of November sixth, one thousand eight hundred and thirty-eight, by the fifth and seventh articles of the treaty of November twenty-eight, one thousand eight hundred and forty, or by virtue of two resolutions of Congress, approved March third, one thousand eight hundred and forty-five, and May first, one thousand eight hundred and fifty, or otherwise, are permitted to draw or have drawn, in the State of Indiana, their proportion of the annuities of the Miami tribe.

ARTICLE 4. It is agreed that the remaining instalments of the limited annuity of twelve thousand five hundred dollars, stipulated to be paid by the second article of the treaty of November twenty-eight, one thousand eight hundred and forty, shall be divided and paid to the said Indians hereafter as follows: to the Indiana Miamis, six thousand eight hundred and sixty-three dollars and sixty-four cents, and to the Western Miamis, five thousand six hundred and thirty-six dollars and thirty-six cents, per annum; subject, however, to the deductions provided for in the sixth article of this instrument; and that the permanent annuity stipulated in the fifth article of the treaty of October sixth, one thousand eight hundred and eighteen, as modified by the fifth article of the treaty of October twenty-third, one thousand eight hundred and thirty-four, for a blacksmith and miller, shall be continued for the benefit of said Western Miamis; but the said Miami Indians hereby relinquish and forever absolve the United States from the payment of the permanent annuity of twenty-five thousand dollars, stipulated in the fourth article of the treaty of October twenty-third, one thousand eight hundred and twenty-six, of the permanent provisions from money in lieu of laborers, for agricultural assistance, for tobacco, iron, steel, and salt, and from the payment of any and all other annuities of every kind or description, if any there be, to which said Indians may now be entitled by virtue of the stipulations of any former treaty or treaties; and they also release and discharge the United States from all claims or damages on account of the non-fulfilment of the stipulations of any former treaties; or of injuries to, or destruction or loss of property by the wrongful acts of citizens or agents of the United States or otherwise; and in consideration of the relinquishments and releases aforesaid, the United States agree to pay to the said Miami Indians, the sum of four hundred and twenty-one thousand four hundred and thirty-eight dollars and sixty-eight cents, in manner as follows, viz: one hundred and ninety thousand four hundred and thirty-four dollars and sixty-eight cents, to the Miami Indians residing on the ceded land; and two hundred and thirty-one thousand and four dollars, to the Miami Indians in the State of Indiana; to be paid under the direction of the President, and in such manner and for such objects as he may prescribe, in six equal annual instalments, the first of which shall be paid in the month of October, one thousand eight hundred and fifty-four. And in full payment and satisfaction of a balance of eight thousand dollars and sixty-eight cents, heretofore appropriated by Congress to pay for the valuation of certain improvements, or to make others in lieu of them, but which, not having been expended, has gone to the surplus fund; and of the accumulation of the appropriations for the support of the poor and infirm, and the education of the youth of the tribe, as provided by the treaties of October twenty-third, one thousand eight hundred and twenty-six, and November sixth, one thousand eight hundred and thirty-eight, amounting to fourteen thousand two hundred and twenty-three dollars and fifty cents; and of the claims if the Miamis who live on the ceded land, for damages and loss of stock and other property, caused by their removal west, and their subsequent loss by removal from Sugar Creek – it is agreed that the

United States will pay to the Miami Indians residing on said ceded lands, the sum of thirty thousand dollars, to be paid as follows, viz: fourteen thousand two hundred and twenty-three dollars and fifty cents, in three equal annual instalments, the first of which shall be paid in the month of October, one thousand eight hundred and fifty-four; and the sums of eight thousand dollars and sixty-eight cents, in lieu of the improvement money referred to, and seven thousand seven hundred and seventy-five dollars and eighty-two cents, being the residue of said amount of thirty thousand dollars, shall be paid immediately after the requisite appropriation shall have been made: *Provided,* That the said sum of eight thousand dollars and sixty-eight cents, shall be paid to the persons who are entitled to the same, as far as that may be practicable; and the seven thousand seven hundred and seventy-five dollars and eighty-two cents shall be paid to such of the Miamis west as have lost stock or other property by wrongful acts of citizens of the United States, while in the Indian country, and to those who were injured by the loss of improvements in their removal from Sugar Creek to their present home. The claimants, in all cases, to file their demands with the chiefs within six months after the ratification of this instrument; and if the aggregate sum of the lawful claims exceeds the amount of the fund, the claims shall be reduced by a uniform rule, so that each claimant shall receive his pro rata; but if it fall within the amount of said fund, the excess shall be paid to the tribe as annuities are paid. Any person aggrieved by the decision of the chiefs may appeal to the agent.

The sum of two hundred and thirty-one thousand and four dollars hereby stipulated to be paid to Miami Indians of Indiana shall be held by the United States for said last-named Indians, and by the Government invested, as the President may direct, at an interest of five per cent, per annum, and which interest shall be paid annually, for the period of twenty-five years, to the said Miami Indians of Indiana, and at the expiration of that time, or sooner if required by them and approved by the President, the principal sum to be paid in full, the United States being directly responsible therefor; said investment to be made and the interest thereon to commence accruing the first day of July eighteen hundred and fifty-five, and thence to continue: *Provided,* That no persons other than those embraced in the corrected list agreed upon by the Miamis of Indiana, in the presence of the Commissioner of Indian Affairs, in June, eighteen hundred and fifty-four, comprising three hundred and two names as Miami Indians of Indiana, and the increase of the families of the persons embraced in said corrected list, shall be recipients of the payments, annuities, commutation moneys and interest hereby stipulated to be paid to the Miami Indians of Indiana, unless other persons shall be added to said list by the consent of the said Miami Indians of Indiana, obtained in council, according to the custom of Miami tribe of Indians: *Provided,* that the sum of nine thousand seven hundred and forty-six dollars and fourteen cents shall immediately be paid out of said sum of two hundred and thirty-one thousand and four dollars (and deducted from the same) to the following persons, who are a portion of the Miami tribe of Indians residing in Indiana, and in the following manner; seven thousand six hundred and eighty-nine dollars and twenty-two cents to the family of Jane T. Griggs, consisting of herself and six children, to wit, Warren A–, Charles F–, Anthony W–, Ann Eliza–, Martha Jane, and Maria Elizabeth Griggs, which sum may be paid to the said Jane T. Griggs, and her husband John H. Griggs, the father of said children, or to either of them; and the sum of two thousand and fifty-six dollars and ninety-two cents to Sash-o-quash and his wife, E-len-e-pish-o-quash, which may be paid to the said Sash-o-quash, it being understood that the said Griggs family have drawn but one annuity for the last eight years, the others having been paid to the balance of the tribe; which sum of nine thousand seven hundred and forty-six dollars and fourteen cents is to be in full payment and satisfaction of all sums of money that may be due, owing or coming to said two families, by virtue of this and all former treaties on account of their being of the Miami tribe of Indians or otherwise.

The Miami Indians of Indiana, being now represented in Washington by a fully authorized deputation, and having requested the foregoing amendments, the same are binding on them; but these amendments are in no way to affect or impair the stipulations in said treaty contained as to the Miamis west of the Mississippi, the said amendments being final, and not required to be submitted to the Miamis for their consent:

And the sum of two thousand two hundred dollars is hereby directed to be paid to the said Indians residing in the State of Indiana, for time employed and money expended in assisting to make this treaty, which may be paid to James T. Miller, their interpreter, and Tyn-yi-oh-te-mah, or to either of them, to be divided among said Indians according to justice and equity.

ARTICLE 5. It is hereby understood and agreed, respecting the permanent annuity of twenty-five thousand dollars, that the said Indians shall receive the same for the years eighteen hundred and fifty-four and eighteen hundred and fifty-five, but no longer. It is also understood and agreed (the Miamis west consenting) that as the Miamis of Indiana have had no share of the iron, steel, salt, tobacco, and so forth, given under treaty stipulations, and that as there is now in the Treasury under those heads of appropriation an unexpended balance of four thousand and fifty-nine dollars and eight cents, they shall have and receive said amount – and that the said annuity of twenty-five thousand dollars for said two years shall be divided between the Miamis of Indiana and those west of Missouri, in the same proportion as the annuity of twelve thousand five hundred dollars is divided in the preceding article.

ARTICLE 6. The United States having advanced, in pursuance of a provision of the act of Congress approved August thirtieth, one thousand eight hundred and fifty-two, entitled "An act making appropriations for the current and contingent expenses of the Indian Department," & c., the sum of twelve thousand four hundred and thirty-seven dollars and six cents to the Miami Indians, for the payment of an amount due to the Eel River band that had been erroneously paid to the "Miami Nation;" and the sum of one thousand five hundred and fifty-four dollars and sixty-three cents only, having, since said advance, been withheld by the United States, as a reimbursement in part therefor, and there being still due to the United States, on account thereof, the sum of ten thousand eight hundred and eighty-two dollars and forty-three cents, it is hereby agreed that said balance shall be reimbursed fully to the United States out of the limited annuity of twelve thousand five hundred dollars, before mentioned in this instrument, in the manner and proportions following; that is to say, out of said annuity for the year one thousand eight hundred and fifty-four, and each of the five consecutive years, there shall be retained from the portion to be paid in those years to the Miamis of Indiana, the sum of eight hundred and fifty-three dollars and sixty-three cents, and from the portion to be paid to the Miamis west, the sum of seven hundred dollars and ninety-nine cents, and in the year one thousand eight hundred and sixty, from the portion due the Miamis of Indiana, the sum of eight hundred and fifty-three dollars and sixty-eight cents, and from the portion due those west, the sum of seven hundred and one dollars and three cents.

ARTICLE 7. Citizens of the United States or other persons not members of said tribe, shall not be permitted to make locations or settlements in the ceded country, until after the selections hereinbefore provided for have been made; and the provisions of the act of Congress approved March third, one thousand eight hundred and seven, in relation to lands ceded to the United States, shall, so far as the same are applicable, be extended to the lands herein ceded.

ARTICLE 8. The debts of Indians contracted in their private dealings as individuals, whether to traders or otherwise, shall not be paid out of the general fund. And should any of said Indians become intemperate or abandoned, and waste their property, the President may withhold any moneys due or payable to such, and cause them to be paid, expended or applied, so as to ensure the benefit thereof to their families.

Article 9. The said Indians promise to renew their efforts to prevent the introduction and use of ardent spirits in their country, to encourage industry, thrift, and morality, and by every possible means to promote their advancement in civilization. They desire to be at peace with all men, and they bind themselves not to commit depredations or wrong upon either Indians or citizens; and should difficulties at any time arise, they will abide by the laws of the United States in such cases made and provided, as they expect to be protected, and to have their rights vindicated by those laws.

Article 10. It is agreed that all roads and highways, laid out by authority of law, shall have right of way through the lands herein reserved, on the same terms as are provided by law when roads and highways are made through lands of citizens of the United States; and railroad companies, when the lines of their roads necessarily pass through the lands of the said Indians, shall have right of way on the payment of a just compensation therefor in money.

Article 11. The object of this instrument being to advance the interests of said Indians, it is agreed, if it prove insufficient, from causes which cannot now be foreseen, to effect these ends, that the President may, by and with the advice and consent of the Senate, adopt such policy in the management of their affairs, as, in his judgment, may be most beneficial to them; or Congress may, hereafter, make such provision by law, as experience shall prove to be necessary.

Article 12. It is agreed that the first instalment of the fourteen thousand two hundred and twenty-three dollars and fifty cents, mentioned in the fourth article, being the accumulation of the poor, infirm, and education fund, shall be applied, under the direction of the President, to purposes of education; and that a sufficient sum shall annually be set apart out of the payments to the Miamis west of Missouri, so long as any of the annuities herein provided for shall continue, to be expended under the direction of the chiefs, for the support of the poor and infirm, and for defraying any expenses of the tribe of a civil nature.

Article 13. It is hereby agreed that the sum of six thousand five hundred dollars may be set apart from each of the first four annual payments to be made to the Miamis west, and applied as far as it may be necessary, to the settlement of their affairs. It is also agreed that so much as may be necessary for the repair of their mill and schoolhouse, shall be set apart from any fund now on hand belonging to said Indians, or be taken from any of the first instalments in this instrument provided for.

Article 14. This instrument shall be obligatory on the contracting parties whenever the same shall be ratified by the President and the Senate of the United States.

In testimony whereof the said George W. Manypenny, Commissioner as aforesaid, and the said delegates representing the Miami tribe of Indians, and also the said Miami Indians residents of the State of Indiana, have hereunto set their hands and seals, at the place, and on the day and year first above written.

George W. Manypenny, commissioner. [L. S.]
Nah-we-lan-quah, or Big Legs, his x mark. [L. S.]
Ma-cat-a-chin-quah, or Little Doctor, his x mark. [L. S.]
Lan-a-pin-cha, or Jack Hackley. [L. S.]
So-ne-lan-gish-eah, or John Bowrie, his x mark. [L. S.]
Wan-zop-e-ah, his x mark. [L. S.]

Miamis of Indiana:
Me-shin-go-me-zia, his x mark. [L. S.]
Po-con-ge-ah, his x mark. [L. S.]
Pim-yi-oh-te-nah, his x mark. [L. S.]
Wop-pop-pe-tah, or Bondy. [L. S.]
Ke-ah-cot-woh, or Buffalo, his x mark. [L. S.]

Executed in presence of –
Nathan Rice,
Joseph F. Brown,
Robert Campbell,
James T. Miller,
Wm. B. Waugh,
Ely Moore, Indian agent,
Baptiste Peoria, his x mark, U. S. interpreter.
W. B. Waugh, witness to signing of Baptiste Peoria.

APPENDIX E

25 C.F.R. PART 83 – PROCEDURES FOR ESTABLISHING THAT AN AMERICAN INDIAN GROUP EXISTS AS AN INDIAN TRIBE

Sec.
83.1 Definitions.
83.2 Purpose.
83.3 Scope.
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83.7 Form and content of petition.
83.8 Notice of receipt of petition.
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83.10 Reconsideration and final action.
83.11 Implementation of decisions.

AUTHORITY: 5 U.S.C. 301; secs. 463 and 465 of the Revised Statutes, 26 U.S.C. 2 and 9; and 230 DM 1 and 2.

SOURCE: 43 FR 39361, Sept. 5, 1976, unless otherwise noted, Redesignated at 47 FR 13327, Mar. 30, 1982.

§ 83.1 Definitions.

(a) "Secretary" means the Secretary of the Interior or his authorized representative.

(b) "Assistant Secretary" means the Assistant Secretary – Indian Affairs, or his authorized representative.

(c) "Department" means the Department of the Interior.

(d) "Bureau" means the Bureau of Indian Affairs.

(e) "Area Office" means the Bureau of Indian Affairs Area Office.

(f) "Indian tribe," also referred to herein as "tribe," means any Indian group within the continental United States that the Secretary of Interior acknowledges to be an Indian tribe.

(g) "Indian group" or "group" means any Indian aggregation within the continental United States that the Secretary of the Interior does not acknowledge to be an Indian tribe.

(h) "Petitioner" means any entity which has submitted a petition to the Secretary requesting acknowledgement that it is an Indian tribe.

(i) "Autonomous" means having a separate tribal council, internal process, or other organizational mechanism which the tribe has used as its own means of making tribal decisions independent of the control of any other Indian governing entity. Autonomous must be understood in the context of the Indian culture and social organization of that tribe.

(j) "Member of an Indian group" means an individual who is recognized by an Indian group as meeting its membership criteria and who consents to being listed as a member of that group.

(k) "Member of an Indian tribe" means an individual who meets the membership requirements of the tribe as set forth in its governing document or is recognized collectively by those persons comprising the tribal governing body, and has continuously maintained tribal relations with the tribe or is listed on the tribal rolls of that tribe as a member, if such rolls are kept.

(l) "Historically", "historical" or "history" means dating back to the earliest documented contact between the aboriginal tribe from which the petitioners descended and citizens or officials of the United States, colonial or territorial governments, or if relevant, citizens and officials of foreign governments from which the United States acquired territory.

(m) "Continuously" means extending from generation to generation throughout the tribe's history essentially without interruption.

(n) "Indigenous" means native to the continental United States in that at least part of the tribe's aboriginal range extended into what is now the continental United States.

(o) "Community" or "specific area" means any people living within such a reasonable proximity as to allow group interaction and a maintenance of tribal relations.

(p) "Other party" means any person or organization, other than the petitioner who submits comments or evidence in support of or in opposition to a petition.

§ 83.2 Purpose.

The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian tribes exist. Such acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits from the Federal Government available to Indian tribes. Such acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes as well as the responsibilities and obligations of such tribes. Acknowledgement shall subject the Indian tribe to the same authority of Congress and the United States to which other federally acknowledged tribes are subjected.

§ 83.3 Scope.

(a) This part is intended to cover only those American Indian groups indigenous to the continental United States which are ethnically and culturally identifiable, but which are not currently acknowledged as Indian tribes by the Department. It is intended to apply to groups which can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.

(b) This part does not apply to Indian tribes, organized bands, pueblos or communities which are already acknowledged as such and are receiving services from the Bureau of Indian Affairs.

(c) This part is not intended to apply to associations, organizations, corporations or groups of any character, formed in recent times; provided that a group which meets the criteria in § 83.7(a) through (g) has recently incorporated or otherwise formalized its existing autonomous process will have no bearing on the Assistant Secretary's final decisions.

(d) Nor is this part intended to apply to splinter groups, political factions, communities or groups of any character which separate from the main body of a tribe currently acknowledged as being an Indian tribe by the Department, unless it can be clearly established that the group has functioned throughout history until the present as an autonomous Indian tribal entity.

(e) Further, this part does not apply to groups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship.

§ 83.4 Who may file.

Any Indian group in the continental United States which believes it should be acknowledged as an Indian tribe, and can satisfy the criteria in § 83.7, may submit a petition requesting that the Secretary acknowledge the group's existence as an Indian tribe.

§ 83.5 Where to file.

A petition requesting the acknowledgment that an Indian group exists as an Indian tribe shall be filed with the Assistant Secretary – Indian Affairs, Department of the Interior, 18th and "C" Streets NW., Washington, D.C. 20246. Attention: Federal acknowledgment project.

§ 83.6 Duties of the Department.

(a) The Department shall assume the responsibility to contact, within a twelve-month period following the enactment of these regulations, all Indian groups known to the Department in the continental United States whose existence has not been previously acknowledged by the Department. Included specifically shall be those listed in chapter 11 of the American Indian Policy Review Commission final report, volume one, May 17, 1977. The Department shall in-form [sic] all such groups of the opportunity to petition for an acknowledgment of tribal existence by the Federal Government.

(b) The Secretary shall publish in the FEDERAL REGISTER within 90 days after effective date of these regulations, a list of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs. Such list shall be updated and published annually in the FEDERAL REGISTER.

(c) Within 90 days after the effective date of the final regulations, the Secretary will have available suggested guidelines for the format of petitions, including general suggestions and guidelines on where and how to research for required information. The Department's example of petition format, while preferable, shall not preclude the use of any other format.

(d) The Department shall, upon request, provide suggestions and advice to researchers representing a petitioner for their research into the petitioner's historical background and Indian identity. The Department shall not be responsible for the actual research on behalf of the petitioner.

§ 83.7 Form and content of the petition.

The petition may be in any readable form which clearly indicates that it is a petition requesting the Secretary to acknowledge tribal existence. All the criteria in paragraphs (a) through (g) of this section are mandatory in order for tribal existence to be acknowledged and must be included in the petition.

(a) A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis, as "American Indian," or "aboriginal." A petitioner shall not fail to satisfy any criteria herein merely because of fluctuations of tribal activity during various years. Evidence to be relied upon in determining the group's substantially continuous Indian identity shall include one or more of the following:

(1) Repeated identification by Federal authorities;

(2) Longstanding relationships with State governments based on identification of the group as Indian;

(3) Repeated dealings with a county, parish, or other local government in a relationship based on the group's Indian identity;

(4) Identification as an Indian entity by records in courthouses, churches, or schools;

(5) Identification as an Indian entity by anthropologists, historians, or other scholars;

(6) Repeated identification as an Indian entity in newspapers and books;

(7) Repeated identification and dealings as an Indian entity with recognized Indian tribes or national Indian organizations.

(b) Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area.

(c) A statement of facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present.

(d) A copy of the group's present governing document, or in the absence of a written document, a statement describing in full the membership criteria and the procedures through which the group currently governs its affairs and its members.

(e) A list of all known current members of the group and a copy of each available former list of members based on the tribe's own defined criteria. The membership must consist of individuals who have established, using evidence acceptable to the Secretary, descendancy from a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity. Evidence acceptable to the Secretary of tribal membership for this purpose includes but is not limited to:

(1) Descendancy rolls prepared by the Secretary for the petitioner for purposes of distributing claims money, providing allotments, or other purposes;

(2) State, Federal, or other official records or evidence identifying present members or ancestors of present members as being an Indian descendant and a member of the petitioning group;

(3) Church, school, and other similar enrollment records indicating the person as being a member of the petitioning entity;

(4) Affidavits of recognition by tribal elders, leaders, or the tribal governing body, as being an Indian descendant of the tribe and a member of the petitioning entity;

(5) Other records or evidence identifying the person as a member of the petitioning entity.

(f) The membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe.

(g) The petitioner is not, nor are its members, the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship.

§ 83.8 Notice of receipt of petition.

(a) Within 30 days after receiving a petition, the Assistant Secretary shall send an acknowledgment of receipt, in writing, to the petitioner, and shall have published in the FEDERAL REGISTER a notice of such receipt including the name and location, and mailing address of the petitioner and other such information that will identify the entity submitting the petition and the date it was received. The notice shall also indicate where a copy of the petition may be examined.

(b) Groups with petitions on file with the Bureau on the effective date of these regulations shall be notified within 90 days from the effective date that their petition is on file. Notice of that fact, including the information required in paragraph (a) of this section, shall be published in the FEDERAL REGISTER. All petitions on file on the effective date will be returned to the petitioner with guidelines as specified in § 83.6(c) in order to give the petitioner an opportunity to review, revise, or supplement the petition. The return of the petition will not affect the priority established by the initial filing.

(c) The Assistant Secretary shall also notify, in writing, the Governor and attorney general of any State in which a petitioner resides.

(d) The Assistant Secretary shall also cause to be published the notice of receipt of the petition in a major newspaper of general circulation in the town or city nearest to the petitioner. The notice will include, in addition to the information in paragraph (a) of this section, notice of opportunity for other parties to submit factual or legal arguments in support of or in opposition to the petition. Such submissions shall be provided to the petitioner upon receipt by the Federal acknowledgement staff. The petitioner shall be provided an opportunity to respond to such submissions prior to a final determination regarding the petitioner's status.

§ 83.9 Processing the petition.

(a) Upon receipt of a petition, the Assistant Secretary shall cause a review to be conducted to determine whether the petitioner is entitled to be acknowledged as an Indian tribe. The review shall include consideration of the petition and supporting evidence, and the factual statements contained therein. The Assistant Secretary may also initiate other research by his staff, for any purpose relative to analyzing the petition and obtaining additional information about the petitioner's status, and may consider any evidence which may be submitted by other parties.

(b) Prior to actual consideration of the petition, the Assistant Secretary shall notify the petitioner of any obvious deficiencies, or significant omissions, that are apparent upon an initial review, and provide the petitioner with an opportunity to withdraw the petition for further work or to submit additional information or a clarification.

(c) Petitions shall be considered on a first come, first serve basis determined by the date of original filing with the Department. The Federal acknowledgement project staff shall establish a priority register including those petitions already pending before the Department.

(d) The petitioner and other parties submitting comments on the petition shall be notified when the petition comes under active consideration. They shall also be notified who is the primary Bureau staff member reviewing the petition, his backup, and supervisor. Such notice shall also include the office address and telephone number of the primary staff member.

(e) A petitioning group may, at its option and upon written request, withdraw its petition prior to publication by the Assistant Secretary of his finding in the FEDERAL REGISTER and, may if it so desires, file an entirely new petition. Such petitioners shall not lose their priority date by withdrawing and resubmitting their petitions later, provided the time periods in paragraph (f) of this section shall begin upon active consideration of the resubmitted petition.

(f) Within 1 year after notifying the petitioner that active consideration of the petition has begun, the Assistant Secretary shall publish his proposed findings in the FEDERAL REGISTER. The Assistant Secretary may extend that period up to an additional 180 days upon a showing of due cause to the petitioner. In addition to the proposed findings, the Assistant Secretary shall prepare a report which shall summarize the evidence for the proposed decision. Copies of such report shall be available for the petitioner and other parties upon written request.

(g) Upon publication of the proposed findings, any individual or organization wishing to challenge the proposed findings shall have a 120-day response period to present factual or legal arguments and evidence to rebut the evidence relied upon.

(h) After consideration of the written arguments and evidence rebutting the proposed findings, the Assistant Secretary shall make a determination regarding the petitioner's status, a summary of which shall be published in the FEDERAL REGISTER within 60 days from the expiration of the response period. The determination will become effective in 60 days from publication unless earlier withdrawn pursuant to § 83.10.

(i) The Assistant Secretary shall acknowledge the existence of the petitioner as an Indian tribe when it is determined that the group satisfies the criteria in § 83.7.

(j) The Assistant Secretary shall refuse to acknowledge that a petitioner is an Indian tribe if it fails to satisfy the criteria in § 83.7. In the event the Assistant Secretary refuses to acknowledge the eligibility of a petitioning group, he shall analyze and forward to the petitioner other options, if any, under which application for services and other benefits may be made.

§ 83.10 Reconsideration and final action.

(a) The Assistant Secretary's decision shall be final for the Department unless the Secretary requests him to reconsider within 60 days of such publication. If the Secretary recommends reconsideration, the Assistant Secretary shall consult, with the Secretary, review his initial determination, and issue a reconsidered decision within 60 days which shall be final and effective upon publication.

(b) The Secretary in his consideration of the Assistant Secretary's decision may review any information available to him, whether formally part of the record or not; where reliance is placed on information not of record, such information shall be identified as to source and nature, and inserted in the record.

(c) The Secretary may request reconsideration of any decision by the Assistant Secretary but shall request reconsideration of any decision, which in his opinion:

(1) Would be changed by significant new evidence which he has received subsequent to the publication of the decision; or

(2) A substantial portion of the evidence relied on was unreliable or was of little probative value; or

(3) The petitioner's or the Bureau's research appears inadequate or incomplete in some material respect.

(d) Any notice which by the terms of these regulations must be published in the FEDERAL REGISTER, shall also be mailed to the petitioner, the Governors and attorney generals of the States involved, and to other parties which have commented on the proposed findings.

§ 83.11 Implementation of decisions.

(a) Upon final determination that the petitioner is an Indian tribe, the tribe shall be eligible for services and benefits from the Federal Government available to other federally recognized tribes and entitled to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes with a government-to-government relationship to the United States as well as having the responsibilities and obligations of such tribes. Acknowledgment shall subject such Indian tribes to the same authority of Congress and the United States to which other federally acknowledged tribes are subject.

(b) While the newly recognized tribe shall be eligible for benefits and services, acknowledgment of tribal existence will not create an immediate entitlement to existing Bureau of Indian Affairs programs. Such programs shall become available upon appropriation of funds by Congress. Requests for appropriations shall follow a determination of the needs of the newly recognized tribe.

(c) Within 6 months after acknowledgment that the petitioner exists as an Indian tribe, the appropriate Area Office shall consult and develop in cooperation with the group, and forward to the Assistant Secretary, a determination of needs and a recommended budget required to serve the newly acknowledged tribe. The recommended budget will be considered along with other recommendations by the Assistant Secretary in the usual budget-request process.